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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 285

SAXE, BACON & O'SHEA,

Petitioner,

v.

SURFACE TRANSIT INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 6, 1959

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered herein May 11, 1959.

Opinions Below

The opinions of the District Court are unreported and are printed at pages 2-69 of the separately printed Appendix submitted herewith. The opinion of the Court of Appeals (266 F. 2d 862) is printed at pages 70-81 of the Appendix.

Jurisdiction

The order of the Court of Appeals was entered on May 11, 1959. Jurisdiction is invoked under 28 U. S. C. §1254 (1).

Question Presented

Where the bankruptcy court has not abused its discretion in fixing fees under Chapter X of the Bankruptcy Act, may the Court of Appeals determine *de novo* the compensation of counsel for the reorganization trustees and substitute its view thereon for that of the bankruptcy court?

Statutes Involved

The statutory provisions involved are Bankruptcy Act §§241 and 250, 11 U. S. C. §§641, 650 (52 Stat. 900, 901). They are printed at page 1 of the Appendix.

Statement of the Case

The jurisdiction of the District Court was invoked because the question arose under Chapter X of the federal bankruptcy laws. Following the reorganization of the Third Avenue Transit System the District Court made final fee allowances to the various participants, including an allowance to counsel for the Trustees of $900,000 for 42,000 hours of services rendered in a seven and one-half year period from 1949 to 1956, an hourly rate of $21.43. The order of the Court of Appeals reduced the award to $800,000, an hourly rate of $19.05. This petition seeks review of the Court of Appeals' order.

The Court of Appeals did not in any respect disagree with the bankruptcy court in its characterization of the complexity and success of the reorganization and

of the efforts of counsel for the Trustees. Indeed, the Court of Appeals noted that the debtor had been "enmeshed in what seemed to be insoluble problems"; that "the reorganization was unusually successful"; that the participants "richly merit the heartfelt thanks of the court and the public"; and that the Trustees and their counsel bore "by far the largest burden of any of the participants" (App. 73-75). The bankruptcy court had said that the reorganization was "an extremely difficult and highly successful one" (App. 5), the "burden carried by . . . counsel for the Trustees was enormous", and "No praise would be too high for [their] services" (App. 28).

Significantly, the Court of Appeals acknowledged that "we cannot say that Judge Dimock's aggregate allowance of $2,068,504.73 is more than the reorganized companies can safely bear" (App. 74).

Nevertheless, the Court of Appeals was "constrained to disagree with specific awards" (*ibid.*) and reduced the rate of compensation for counsel for the Trustees from $21.43 to $19.05 per hour. Without in any manner suggesting that the bankruptcy court had abused its discretion, the Court of Appeals predicated the reduction on the following three grounds, although the bankruptcy court had given the indicated consideration to each such ground:

> (1) ". . . much of the total time logged by the Trustees' counsel was in the performance of essentially routine work actually done by firm associates" (App. 75).

Yet the bankruptcy court had already taken this factor into account, explaining that the rate of compensation allowed counsel for the Trustees was considerably lower

than the $26.50 per hour rate awarded certain other counsel because "much of the work done by counsel for the Trustees was of a routine character which could be done by capable associates". (App. 33).

(2) The recommendation of the Securities and Exchange Commission was "entitled to great weight. . . . *Finn* v. *Childs Co., supra*, 2 Cir. 181 F. 2d 431" (App. 74).

But the bankruptcy court had meticulously followed "the injunction of the *Childs* case" by not exceeding the S. E. C. recommendations "without definite findings and conclusions showing why this step is deemed necessary" (App. 20), concluding:

". . . . The amount recommended by the SEC [$800,000] would have yielded $19 an hour. *I find such a return for the efforts expended in this case to be entirely inadequate.* . . . I find that $100,000 must be added to the SEC's recommendation in order to give to counsel for the Trustees their fair share of the fund available for compensation of all. That will remunerate them at the rate of a little more than $21 an hour, a rate far below that on which firms of similar standing in New York City are compensated by private clients in these days of the depreciated dollar." (App. 29; italics supplied.)

(3) The compensation of such counsel "was always assured, and not contingent on success" (App. 75).

To the contrary, the very fact of reorganization and the existence of what the appellate court termed "insoluble problems" perforce made all fees "contingent on success" since dependent upon the funds available. Both the bankruptcy court and the Court of Appeals expressly considered what aggregate fees

the reorganized companies could safely afford to bear (App. 19-24; 74). Such findings necessarily depended on the available assets of the debtor, which during the seven and one-half year period of reorganization had increased tremendously, owing in large measure to the efforts of petitioner (App. 5-6, 28).

Reasons for Granting the Writ

I

The decision of the court below conflicts with the well-settled rule exemplified in the decisions of seven other Courts of Appeals which have considered the reasonableness of fees allowed by bankruptcy courts under Chapter X.[1]

The courts of other Circuits have respected the findings of the district judge except where "abuse of discretion" has been found.[2] This respect for the integrity of the bankruptcy court is best shown by the definition in other Circuits of "abuse" in terms of "manifesting

[1] 1st Circuit *Davis Transformer Co.* v. *Mansfield*, 141 F. 2d 681, 682 (1944)

3rd Circuit *In re Solar Mfg. Corp.*, 206 F. 2d 780, 781 (1953)

4th Circuit *Johnson* v. *Carolina Scenic Stages*, 242 F. 2d 263, 265 (1957)

6th Circuit *In re Van Sweringen Corp.*, 180 F. 2d 119, 121 (1950)

7th Circuit *Matter of Chicago & West Towns Railways, Inc.*, 230 F. 2d 364, 368 (1956), *cert. denied sub nom. Elward* v. *Friedman*, 351 U. S. 943

8th Circuit *Stark* v. *Woods Bros. Corp.*, 109 F. 2d 969, 973-74 (1940)

10th Circuit *Oklahoma Ry. Co.* v. *Johnston*, 155 F. 2d 500, 503 (1946)

[2] See Meyers, Appellate Review of Attorney Allowances in Chapter X Reorganizations, 53 Col. L. Rev. 1039, 1040, 1068 (1953).

a disregard of right and reason". *In re West Counties Const. Co.*, 182 F. 2d 409, 411 (7th Cir. 1950); *In re Mt. Forest Fur Farms of America, Inc.*, 157 F. 2d 640, 648 (6th Cir. 1946); *Stark* v. *Woods Bros. Corp.*, 109 F. 2d 969, 973-74 (8th Cir. 1940); *In Re Standard Gas & Electric Co.*, 106 F. 2d 215, 216 (3d Cir. 1939). This appears comparable to the "clearly erroneous" test prescribed in Rule 52 of the Federal Rules of Civil Procedure, relied upon by the Ninth Circuit in reviewing bankruptcy fee allowances in *In re American Mail Line*, 115 F. 2d 196, 199 (1940).

In the instant case the appellate court made no finding of abuse of discretion; and it is respectfully submitted that as a matter of law the reduction of the hourly rate of compensation by the Court of Appeals from $21.43 to $19.05 cannot reflect an abuse of discretion by the bankruptcy court but only a difference of opinion. As the Court of Appeals itself stated, it was simply "constrained to disagree" as to the exact amount deemed reasonable (App. 74). Yet the appellate court could not have had the same intimate knowledge as the bankruptcy court.[3]

II

The decision below conflicts with the principle expressed in decisions of this Court. *Leiman* v. *Guttman*, 336 U. S. 1; *Brown* v. *Gerdes*, 321 U. S. 178; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382.

[3] Judge Dimock had observed the work of counsel for the Trustees for more than five years, although counsel had been appointed by another District Judge who presided during the early years of the reorganization. The typewritten transcript of the record on review in the Court of Appeals totalled in excess of twenty-seven thousand pages.

In *Dickinson* the Court stated (309 U. S. at 389): "Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion."

In *Leiman* the Court said (336 U. S. at 9):

> "... *it is the bankruptcy court that is in the best position to know* what work was done by the fee claimant, how important and involved it was, how much it benefited the whole group of security holders and how much it benefited the one class alone, how much of it was necessary, how much of it was effective." (Italics supplied.)

Review is warranted by "the importance in reorganization proceedings of the power of the District Court over such allowances." *Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262, 264.

III

The question presented is of general importance to the exposition of the federal bankruptcy laws—specifically, to the continuing representation by the Bar of reorganization trustees and other participants and to the proper exercise by the district courts of their obligation to appoint competent counsel and to determine reasonable fees.

It was with evident regret that Judge Dimock felt compelled to reduce the rate of $25.57 per hour requested by petitioner to $21.43 (App. 29). He did so only after "due allowance for the fact that the money being paid is the money of the security holders and not that of private clients ... [and] the fact that there are not funds available sufficient to pay those who have contributed to this successful result in accordance with what their services merit" (*ibid.*). That the

Court of Appeals should then whittle the allowance down an additional $2.50 per hour, while at the same time concluding that the reorganized companies could "safely bear" the bankruptcy court's allowance, is as disparaging as it is disheartening.

The approach adopted by the Court of Appeals will not only stimulate the "unseemly parade to the appellate courts" which this Court has sought to obviate (*Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 389); it will inevitably discourage competent representation of security holders and court-appointed trustees. As one writer has stated:[4]

> "... economy can be overdone; the courts should not lose sight of the fact that good legal representation costs money and that debtors' estates must pay the price if they are to be administered properly and if all interested parties are to be adequately represented."

Although public-spirited counsel accept the fact that economy of bankruptcy administration is important, they will be reluctant to undertake such representation if the modest compensation now being awarded by the bankruptcy courts is subjected to further paring by the appellate court capriciously and without any abuse of discretion below.

The decision represents an unfortunate departure from the "abuse of discretion" principle once established in this Circuit pursuant to which the appellate court recognized, in the words of the late Judge Frank, that the bankruptcy judge "was familiar, as we are not, with the actual work done and therefore far better able to appraise it than we can from mere

[4] Meyers, *op. cit. supra* note 2, at 1071.

study of the paper record . . ." *In re Realty Associates Securities Corp.*, 156 F. 2d 480, 483 (1946); see also *In re Long Island Properties, Inc.*, 150 F. 2d 313 (2d Cir. 1945). Indeed, by usurping the role of the bankruptcy court the Court of Appeals has rendered even more difficult the complex task of fee determinations by forcing the bankruptcy judge to anticipate the appellate court's *de novo* consideration rather than give sincere expression to his own informed judgment.

Conclusion

While a fee allowance decision may seem at first blush too factual in nature to require the exercise of this Court's certiorari jurisdiction, the court below has committed an error of law which will weaken the incentive for fiduciary representation in the very Circuit where able counsel are most needed for bankruptcy proceedings, and which therefore deserves attention and correction here. The writ should be granted.

Respectfully submitted,

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APPENDIX

TO

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August 6, 1959

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Statutes Involved

BANKRUPTCY ACT

"SEC. 241. The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act."

"SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Opinion on Applications for Compensation and Allowances.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* THIRD AVENUE TRANSIT CORPORATION, SURFACE TRANSPORTATION CORPORATION OF NEW YORK, WESTCHESTER STREET TRANSPORTATION COMPANY, INC., THE WESTCHESTER ELECTRIC RAILROAD COMPANY, WARONTA PRESS, INC., Debtors.	In Proceedings for the Reorganization of Corporations Pursuant to Chapter X of the Bankruptcy Act. No. 85851 No. 86410 No. 86413 No. 86412 No. 86537 (Consolidated Proceedings)

RICHARD V. BANDLER, New York City, for Securities and Exchange Commission.

SHEARMAN & STERLING & WRIGHT, New York City, for SURFACE TRANSIT INC. and FIFTH AVENUE COACH LINES, INC., (GRAYSON M. P. MURPHY, New York City *of counsel*).

SAXE, BACON & O'SHEA, New York City, (EDWARD D. BURNS and JOHN A. KISER, New York City, *of counsel*) *pro se* and for LESTER T. DOYLE.

I. HOWARD LEHMAN, New York City, *pro se*.

DENNIS HURLEY, New York City, for EDWARD C. MAGUIRE.

KELLEY, DRYE, NEWHALL & MAGINNES, New York City, (FRANK H. HEISS, New York City, of counsel) *pro se* and for THE HANOVER BANK.

HAYS, ST. JOHN, ABRAMSON & HEILBRON, New York City, (OSMOND K. FRAENKEL and MORRIS SHILENSKY, of New York City, *of counsel*) *pro se*.

Opinion on Applications for Compensation and Allowances.

EDWARD M. GARLOCK, New York City, *pro se.*

ARTHUR KARGER, New York City, for Estate of Robert Irving Lennox.

HAROLD P. SELIGSON, EDMUND BURKE, JR. and MORTON E. YOHALEM, New York City, *pro se* and for AMOTT COMMITTEE FOR REFUNDING MORTGAGE BONDHOLDERS.

MURPHY, BLOCK, SULLIVAN & SAWYER, New York City, DANIEL W. BLUMENTHAL and VICTOR S. GETTNER (JOHN D. SULLIVAN, New York City, of counsel) *pro se* and for O'CONNELL COMMITTEE FOR REFUNDING MORTGAGE BONDHOLDERS.

MUDGE, STERN, BALDWIN & TODD, New York City, (LEONARD GARMENT, *of counsel*) for STONE & WEBSTER SERVICE CORP.

WINTHROP, STIMSON, PUTNAM & ROBERTS, New York City, (MERRELL E. CLARK, New York City, *of counsel*), for REIS & CHANDLER, INC.

WAGNER, QUILLINAN & TENNANT, New York City, (FRANCIS J. QUILLINAN and SIDNEY R. NUSSENFELD, New York City *of counsel*) *pro se* and for COLONIAL TRUST COMPANY.

CRAVATH, SWAINE & MOORE, New York City, (FREDERICK S. BEEBE, New York City, *of counsel*) *pro se.*

AMEN, GANS, WEISMAN & BUTLER, New York City, (HIRAM S. GANS, New York City, *of counsel*) *pro se* and for BROWN COMMITTEE FOR ADJUSTMENT INCOME BONDHOLDERS and EUGENE TUCK.

KRESEL & MEYERSON, New York City, (HAROLD I. MEYERSON, New York City, *of counsel*) *pro se.*

BAKER, OBERMEIER & ROSNER, New York City, (OSCAR S. ROSNER, New York City, *of counsel*), *pro se* and for CHARLES B. WIGGIN and EDWARD A. ROBERTS.

E. Ralph Sterling, New York City, *pro se.*

Bergerman & Hourwich, New York City, (Milton M. Bergerman and Joseph Calderon, New York City, *of counsel*) *pro se* and for Dr. John Bauer and Nathanial Gold.

Pack & Strumpf, New York City, (Howard D. Pack, New York City, *of counsel*) *pro se.*

Charles Poletti; Hoffman, Buchwald, Nadel, Cohen & Hoffman; and Buchman & Buchman, New York City, *pro se.*

Scribner & Miller, New York City, (William T. Jones, New York City, *of counsel*) *pro se* and for Thatcher C. Jones and Edwin M. Slote.

William Mertens, New York City, *pro se.*

Alfred S. Julien, New York City, *pro se.*

Alfred Koerner, New York City, *pro se* and for Reinhard M. Fischer and Marshall & Stevens, Inc.

A. Philip Woolfson, North Plainfield, New Jersey, *pro se.*

Willkie, Owen, Farr, Gallagher & Walton, New York City, (Robert Hodes, New York City, *of counsel*) for James Hodes.

Holtzmann, Wise & Shepard, New York City, (Jacob L. Holtzmann, New York City, *of counsel*) for Allen & Company.

Louis H. O. Fischmann, New York City, *pro se* and for Estate of Joseph Nemerov, Emanuel Greene, and Schwartz & Holtz.

Gordon, Brady, Caffrey & Keller, New York City for Milton E. Mermelstein.

Opinion on Applications for Compensation and Allowances.

DIMOCK, D. J. In this proceeding, under Chapter X of the Bankruptcy Act, applications for compensation and allowances have been made pursuant to sections 241-250 of the Bankruptcy Act, 11 U. S. C. §§641-650. Various interim allowances have been made on account but for purposes of discussion I will ignore them. The total fees and disbursements requested were $4,374,596.78. The Securities and Exchange Commission, acting pursuant to section 247 of the Act, recommended the payment of only $1,818,476.45 in response to these claims. As will hereinafter appear, I award the sum of $2,068,504.73.

The reorganization that has been accomplished was an extremely difficult and highly successful one. It began on October 25, 1948, with the filing of an involuntary petition in this court for reorganization under Chapter X. After a bitter contest the petition as theretofore amended was, upon consent of the debtor, approved by the court on June 21, 1949. Seven and a half years later, on December 17, 1956, a Joint Plan of Reorganization was consummated. The year 1948 had showed an operating loss of over $2,000,000. The year 1949, during which the reorganization proceedings were begun, showed an operating loss of $1,645,000. The last full year of operation during the reorganization proceedings, the year 1956, showed, on the same basis, operating income of $2,400,000. As of June 30, 1949, the Refunding Bonds, which constituted a first lien on the properties, were selling on the New York Stock Exchange at 47½. As of December 31, 1956, the Refunding Bonds had appreciated in market price to a point where, instead of a total market value of $7,000,000 as of June 30, 1949, their market value was $13,320,000, exclusive of $5,180,000 received during the course of the reorganization as partial payments. The increase in value was approximately 90%. On June 30, 1949, the Adjustment Bonds were selling at 18, indicating a total market value of approximately $4,000,000. As of December 31, 1956, they had a total market value of $8,725,000, an increase of approxi-

mately 115%. On June 21, 1949, the debtor had in cash $646,000 (equivalent to a payroll for two weeks). This had increased to $5,000,000 on December 31, 1956. This was accomplished after cash payments of approximately $5,000,000 to the Refunding Bondholders, after payments of $1,030,000 owed to employees on June 21, 1949 in retroactive pay, after payment of interim compensation to the Trustees and counsel of over $650,000, after the making of additional deposits of over $1,470,000 as security for accident claimants, after increasing the Workmen's Compensation deposit by over $200,000, after payment of approximately $230,000 to the federal government in settlement of its tax claims, after payment to New York State of approximately $87,000 in settlement of its tax claims, after payment of over $800,000 to the City of New York in payment of franchise compensation, real estate and other taxes due the city from the debtors, and after the expenditure of more than $6,300,000 for capital improvements to the system.

The Problems and Their Solution

The three most important factors in the debtor's problem were the rates of fare that it could charge, the rates of wages that it had to pay to the employees and the rate of franchise tax that it had to pay to the city. In the solving of all of these problems the services of the Trustees and counsel were necessary and essential.

The Rates of Fare and Wages

At the time of the appointment of the Trustees on June 21, 1949, the fare was 7¢, to be in effect until June 30, 1949, when, in the absence of an extension by the Public Service Commission, the fare would have reverted to 5¢. Upon prompt application the Commission, on June 29, authorized an extension up to December 31, 1949. In August this court authorized the Trustees to file with the Public Service Commission an interim tariff at the 8¢ rate and the increased

fare was put into effect on August 8, 1949. The filing of the 8¢ tariff raised the question of a possible forfeiture of the debtors' franchises and all questions involved were referred by the court to Honorable Robert P. Patterson, formerly Judge of the Court of Appeals, Second Circuit, as Special Master to hear and report. Negotiations with the city with respect to the franchise agreements ensued. These were broken off by litigation but, after an order of this court directing that the Trustees assume the debtors' franchise obligations and directing the Comptroller of the city to apply $207,000 of the security deposits in his hands to the payment of arrears, an arrangement was worked out with the city for installment payments and settlement of the claimed franchise obligations.

While the proceedings before Judge Patterson were pending, the city and New York City Omnibus Corporation submitted to the Appellate Division of the Supreme Court of the State of New York a controversy raising the same questions and the city succeeded in getting a stay from the United States Court of Appeals pending a determination of the matter by the state court. Counsel for the Public Service Commission and counsel for the Trustees obtained leave to file briefs as amici curiae but, before the matter was determined, the legislature enacted Chapter 163 of the Laws of 1950 taking the matter of rates out of the jurisdiction of the Public Service Commission and vesting it in the city. The Appellate Division then dismissed the controversy as moot. The Trustees immediately petitioned the Board of Estimate of the City of New York for a fare increase. The Board permitted the Trustees to charge as of July 1, 1950, for a period of six months, an increased fare of 10¢ but refused in the cases of all other private operators to permit any increase in fare above 8¢. The Trustees succeeded in having the 10¢ fare extended on four separate occasions.

At the time that the Trustees were struggling to obtain an increase in the fares that they would be permitted to charge they had been subjected to pressure by the demands

of labor. When the trustees took office on June 21, 1949, the contracts between the union and the Third Avenue System had nine days to run. Counsel for the Trustees conferred with representatives of the union and the impartial chairman of the transit industry on June 28th and succeeded in reaching an understanding under which the employees continued to work under the terms of the existing contract until August 31, 1949. This averted a strike on the lines operated by the Trustees although the unions struck the lines of the New York City Omnibus Corporation and the lines of the Fifth Avenue Coach Lines, Inc., and suspended their operations from July 14 to July 22. On February 7, 1950, an arbitrators' award granted the employees an increase of 6¢ an hour. As of January 31, 1950, the Trustees had on hand total cash slightly in excess of one week's payroll. Instructions of the court were sought as counsel for the Refunding Bondholders were pressing for liquidation of the system and objected to any labor increases until income had improved. The court authorized the Trustees to institute without prejudice payment of the 6¢ an hour increase. The court directed immediate application to the Public Service Commission for increase of the fare to 10¢. Further negotiations with the union resulted in further submission of the disputes to an arbitrator who made an award on May 29, 1950, covering lay offs, pensions, etc. The award was approved by the court. Further demands were made shortly before the expiration of the agreement under the award and on December 29, 1950, the Trustees agreed with the union to grant a 10¢ an hour wage increase for a two year contract expressly contingent on approval by the Board of Estimate of a reduction of the Trustees' franchise compensation obligations. This agreement was approved by the court. On November 13, 1951, the union demanded that the trustees install a 40 hour work week on January 1, 1952 without any loss of take home pay. The union also demanded premium overtime for work on Thanksgiving Day. These demands were rejected and there was a strike on the Trustees' lines on Thanksgiving Day.

Counsel for the Trustees instituted litigation in this court based on the claim of an existing contract with the union. A temporary stay of the proposed strike vote was obtained. A motion to vacate it was denied. The union appealed to the Court of Appeals and was successful in having it vacated. This court thereupon ruled that the decision abated the pending proceeding and accepted the union's position that there was no contract. Pursuant to subsequent negotiation an agreement with the union was reached and approved by the court on May 2, 1952. It was to expire on December 31, 1952. On October 30, 1952, the union again demanded a 40 hour week with no loss in take home pay plus 25¢ an hour increase. Intensive negotiations continued up to New Year's Eve but at midnight the union struck the lines of the Trustees as well as the lines of all other private operators. The strike continued for approximately a month during which counsel for the Trustees were in continuous negotiations with the union. These resulted in a stipulation signed by the Trustees and the officers of the union to submit the questions to arbitration. After many hearings an award was handed down on November 18, 1953. This awarded the 40 hour week and various other advantages to the employees but the award reaffirmed the Trustees' right to build schedules to meet service requirements. The Board of Estimate had on December 31, 1953, adopted a resolution providing for a 13¢ fare and limiting the authorization for the collecting of this fare to a period of four months expiring on April 30, 1954. The Board also increased the franchise compensation from ½ of 1% to 3%, of which 2½% was to be held in escrow pending further determination of the Board. The Trustee did not accept the resolution but on and after January 1, 1954, collected the 13¢ fare and continued negotiations with the city. The labor agreement resulting from the arbitration award expired by its terms on November 30, 1955. On that night the parties agreed to a new contract for a term of two years, to commence December 1, 1955, under which the Trustee's employees received a wage

increase of 8¢ an hour. This agreement was subject to obtaining from the Board of Estimate, in the form of a fare increase and other relief, sufficient additional revenues to produce the moneys to meet the increased labor cost. On December 29, 1955, the Board, at a long public hearing, and over opposition, having heard counsel in support of a 15¢ fare, adopted a resolution authorizing the Trustee to charge a 15¢ fare for a period of two years commencing January 1, 1956 and continuing to December 31, 1957. This court directed the Trustee to accept the Board's resolution. It remained in effect until the termination of this proceeding.

Franchise Compensation

In the foregoing resumé of the fare and wage negotiations incidental reference has been made to the franchise compensation, the third of the three most important factors in the problem created by the financial troubles of the debtor. One of the first accomplishments of the Trustees and their counsel was to reach an agreement with the city with respect to the payment of both disputed and undisputed arrears of franchise compensation. The undisputed arrears were to be liquidated at the rate of $25,000 a month, provision was made for determination of the question of liability for the disputed items and for their payment when the undisputed ones had been completely liquidated. This agreement was approved by the court.

On December 29, 1950 the Board of Estimate extended the period for the collection of the straight 10¢ fare then in effect until June 30, 1951, provided that, while during that period the city would defer collection from the Trustees of franchise compensation payments in excess of 1% of the gross receipts, the balance payable under the existing franchise contracts at 4% would accrue and continue to be a liability of the Trustees unless later modified. The Trustees and counsel refused to accept the terms of this resolution and, as a result of further negotiations, the Board of Estimate adopted on December 29, 1950, a resolution providing

for continuance of the 10¢ fare, a reduction of the franchise compensation to 1% and the deferment of the balance of 4% on the express understanding that the subsequent agreement whereunder the debtors were to pay 2½% instead of 5% for the year 1951 would formally be placed into effect as of January 1, 1951. This arrangement was made effective as a modification of the Trustees' franchise contracts.

In the fall counsel had prepared and filed with the Board of Estimate a petition seeking an increase in the fare to 15%, and other relief, and requesting the city in the event it was unwilling to grant to the Trustees such rates of fare and relief to take prompt steps to purchase the lines. The Trustees and counsel informed the city that no arrangement would be made with the union unless the city granted sufficient relief to permit the Trustees not only to pay labor but to earn sufficient operating income on the basis of which a reorganization might be predicated. After considerable negotiation the Board of Estimate agreed to reduce the Trustees' franchise compensation payments from 2½% to ½ of 1% and agreed to various other forms of relief. On January 24, 1952, the new arrangement was accepted by the Trustees pursuant to the order of the court. On June 3, 1952, the Board of Transportation adopted a resolution abolishing the combination bus-subway fares on July 1, 1952. This involved a loss of riders and revenue to the Third Avenue System and the Trustees renewed the application to the Board of Estimate for a 15¢ fare and the elimination of franchise compensation and utilities taxes on gross revenues. Trustees and counsel were successful in securing an arrangement under which the Trustees would be permitted to continue to charge a 10¢ fare and to pay franchise compensation of ½ of 1% for the period from July 1, 1952 to March 31, 1953. This arrangement was conditioned on the understanding expressly made by counsel that, in the event the union insisted on prosecuting its demand for a 40-hour week with no loss in take home pay, the application for a 15¢ fare and the abolition of franchise

compensation and utility taxes would be renewed in December 1952. When the Board of Estimate on December 31, 1953, adopted a resolution providing for a 13¢ fare, it also increased the franchise compensation from ½ of 1% to 3%, of which 2½% was to be held in escrow pending further determination of the Board. This resolution was not accepted by the Trustee and he and counsel were successful, on February 18, 1954, in getting the Board of Estimate to adopt a resolution awarding to the trustee a 13¢ fare for the years 1954 and 1955 and providing for 1½% franchise compensation for the year 1954 and 3% for the year 1955. In July 1954, a decline in passenger revenue commenced and continued and accelerated during that year and ended in 1955. In March 1955, counsel for the Trustee prepared and filed with the Board of Estimate a petition again requesting a 15% fare and franchise compensation relief. On December 1, 1955, following the completion of negotiations with the union for a new labor agreement, the Trustee renewed the application to the Board for a 15¢ fare and 2¢ transfer charge. On December 29, 1955, the Board authorized the Trustee to charge a 15¢ fare for a period of two years commencing January 1, 1956 and continuing to December 31, 1957. The resolution also provided for a 2% franchise compensation during the period. On January 13, 1956, the court signed an order granting the relief requested. Franchise compensation remained at this rate during the rest of the reorganization period.

The $500,000 Borrowing from the Indenture Trustee

On March 15, 1950, the Trustees found themselves in a financial crisis. On that date they defaulted in the payment of approximately $110,000 principal installments due on notes on conditional sales agreements covering purchase of buses. On March 25 the Trustees were unable to pay $124,800 due the State of New York for utility taxes. Furthermore the Trustees had been directed to make, on March 28, 1950, payment of approximately $78,000 to

employees on account of retroactive pay which accrued subsequent to July 1, 1949 under the arbitrators' award. In this emergency the Trustees petitioned the court for a direction that they borrow from the Indenture Trustee of the Refunding Mortgage the sum of $500,000 and that said Trustee lend that sum to the Trustee. The application was strenuously opposed by the holders of the Refunding Bonds but was granted by the court and the sum of $500,000 was borrowed in one installment of $350,000 and another of $150,000. An appeal from the court's determination was prosecuted by counsel for petitioning creditors. On July 10, 1952, the Court of Appeals rendered a decision reversing the order of the District Court authorizing the borrowing. 198 F. 2d 703. By that time the financial condition of the estate had improved and $50,000 had already been paid upon the $500,000 borrowed. The Trustee had in hand $175,500 received from the settlement of litigations. This sum was paid on September 2, 1952, leaving a balance of $274,500 plus interest. There was borrowed from the Marine Midland Trust Company the sum of $300,000 repayable in $50,000 monthly installments commencing September 28, 1952 with interest at 4% against a prior lien certificate. The amount borrowed was repaid in full in the fall of 1952. The entire $300,000 was not found necessary, $245,000 being all that was needed after payment of $55,000 made up out of general cash.

The Refunding Bonds

From the start a basic problem of administration of the estate was created by the opposing interests of the holders of the Refunding Bonds, who had a first lien upon the estate, and the holders of junior claims, whose hope lay in the possibility of rehabilitating the enterprise. The influence of a very large and influential group of the holders of the Refunding Bonds was always exerted toward conservation of the assets. Refunding Bonds in the approximate amount of $14,830,000 were in the hands of the investing

public. The Central Hanover Bank & Trust Company, the Indenture Trustee, held $667,678.75 in cash and two purchase money mortgages of the face value of $187,466.67. The Reorganization Trustees held, as of August 31, 1949, the sum of $81,555.04, representing proceeds of the sale of capital assets subject to the lien of the mortgage. Shortly after the appointment of the Trustees the Indenture Trustee made an application to the court to enforce its remedies under the indenture against the properties because of existing defaults, or, in the alternative, that the court direct that the Trustees hold the income received subject to mortgage liens. An order was entered satisfactory to counsel. Thereafter the Indenture Trustee served a petition for an order adjudging that it might properly exercise the power to declare the principal of the bonds outstanding under the mortgage to be due and payable immediately. The court denied the motion. In November 1949, on application of counsel for the Trustees the court directed that $169,000 out of the cash in the hands of the Indenture Trustee be used for emergency capital improvements to the Kingsbridge Garage. On December 27, 1951, the court directed the distribution by the Indenture Trustee of the Refunding Mortgage of a sum equal to 5% of the outstanding bonds. As conditions improved five additional distributions, amounting to 30% more, were made.

The principal debtor held $5,681,500 of Refunding Bonds which had been reacquired for investment. It was contended that these Treasury Bonds were entitled to participate in the mortgaged assets on a parity with publicly held bonds for the benefit of all creditors so far as they might be unsecured. Protracted hearings were held on this subject. The District Court upheld the contention that the Treasury Bonds were entitled to participate but the decision was reversed. 222 F. 2d 466.

A major controversy in the reorganization proceedings involved a claim by the Reorganization Trustees and junior creditors that the Reorganization Trustees were entitled

to receive from the Indenture Trustee of the Refunding Mortgage reimbursement for certain expenditures made by the debtor and the Reorganization Trustees. Under article 12 of the Refunding Mortgage, provision was made for the sale by the Third Avenue and a release by the Indenture Trustee of unneeded portions of the mortgaged property, the deposit with the Indenture Trustee of the proceeds of such sales and of any condemnation awards for the mortgaged properties and the application of such proceeds to pay for, or to reimburse the Third Avenue for, various types of capital expenditures for additions and betterments to the mortgaged properties. This article of the mortgage also provided that, in case the mortgaged properties should be in the possession of a receiver or trustee in bankruptcy, the powers of Third Avenue with respect to such releases and application of proceeds could be exercised by such receiver or trustee with the approval of the Indenture Trustee.

At the same time that the Reorganization Trustee initiated the Treasury Bond litigation he sought an order which would find that he was entitled to reimbursement from the Indenture Trustee of all or some part of the sum of $8,741,780 expended by the debtors and the Reorganization Trustees for additions and betterments. This claim was subsequently increased to $12,476,150. This application was denied by the court without prejudice on October 27, 1952. The matter was again pressed in December 1953 and, after full argument and briefing, it was finally denied by the court on March 24, 1954. The matter involved at a minimum the proper distribution of nearly $2,450,000 of cash proceeds of condemnation and releases which were distributed by the Indenture Trustee to the First Refunding Bondholders during the course of the proceeding.

Plans of Reorganization

In 1952, following the completion of the Trustees' report pursuant to section 167 of the Bankruptcy Act, the prepa-

ration of a plan of reorganization by the Trustees was begun. The Trustees' first plan was dated November 6, 1952. Objections were filed by representatives of the various classes of creditors, the debtors and stockholders. Extensive and protracted hearings were held, beginning March 8, 1954, on the valuation aspect of the Trustees' plan of reorganization. In June 1955, an amended plan was filed. In the course of the hearings on the original plan the court, at the conclusion of testimony submitted by the common stockholders, made a finding that the Third Avenue was insolvent and that its stockholders had no interest therein. At the conclusion of the hearings the court determined that the Trustee's amended plan and five plans proposed by other parties were worthy of consideration and referred them to the Public Service Commission and the Securities and Exchange Commission. Seventeen days of hearings before the Public Service Commission ensued. These resulted in a finding by the Public Service Commission that none of the plans of reorganization submitted to it met with its approval. This resulted in the development of a second amended plan of reorganization which involved a proposed commitment by Allen & Company as an underwriter. It was filed on February 15, 1956 and referred to the Public Service Commission by order dated February 23, 1956. The second amended plan was further modified and again held worthy of consideration and referred to the two commissions. Finally, on April 2, 1956, the Public Service Commission filed its opinion with the court certifying that the second amended plan as modified was in the public interest. It, however, was disapproved by a report of the Securities and Exchange Commission filed on May 9, 1956.

On May 16, 1956, while further amendment of the second amended plan was under consideration, Mr. Hiram S. Gans, counsel for the Adjustment Income Bondholders Committee, brought to the Trustee and counsel a proposal of Fifth Avenue Coach Lines, Inc. (formerly New York City Omnibus Corporation) to take over the Third Avenue

enterprise in exchange for stock of Fifth Avenue. On May 31, 1956, the plan was espoused by the Adjustment Income Bondholders Committee. On June 4, 1956, the Adjustment Income Bondholders Committee filed a substitute plan. This plan and the Trustee's second amended plan, as further amended to meet the SEC's objections, were both referred to the New York Public Service Commission and the Securities and Exchange Commission. Hearings were had before the Public Service Commission and, on June 26, 1956, the Commission filed its decision approving both plans. The Trustee and counsel succeeded in obtaining a more advantageous proposal from Fifth Avenue. This provided for the acquisition by Fifth Avenue of all of the stock of a reorganized company in exchange for $4,881,090 and a sufficient number of shares of the capital stock of Fifth Avenue to provide a distribution of 15 shares of such stock for each $1,000 face amount Adjustment Bond, with a minor participation for general unsecured creditors. Having secured this improved offer, the Trustee withdrew his second amended plan and joined in the Income Bondholders Committee plan, as so improved and amended, which was thereafter referred to as the Joint Plan. On June 27, 1956, the court referred the Joint Plan to the Public Service Commission and the Securities and Exchange Commission. It was approved by both Commissions and, on July 24, 1956, the court granted the Trustee's motion for an order approving the Joint Plan. The Joint Plan was accepted by the requisite proportions of security holders on October 8, 1956 and the court signed an order confirming it.

Tax Claims

Federal tax claims of $13,281,180, filed on March 28, 1950 and June 29, 1950, constituted a problem second only in gravity to the problems of rates of fare, franchise compensation and rates of employees' pay. In liquidation, the Refunding Mortgage would be entitled to priority over the government's claims. In reorganization, however, the effect

of section 199 of the Bankruptcy Act was that no reorganization could be put into effect unless it provided for the payment in full of the federal taxes or some other provision was accepted by the Secretary of the Treasury. After prolonged negotiation and argument a complete recomputation of the tax claims of the government was made showing taxes due of approximately $228,000. The matter of obtaining final approval of the settlement at that figure was extremely critical. The debtor had been listed in the public press as one of the major tax delinquents in the metropolitan area. Nevertheless, a settlement was finally approved and the claim fixed at $227,912.56 as compared with the sum of $187,210.53 carried on the books of account of the debtor as of June 21, 1949 as a reserve for the payment of income and other taxes due the United States and the City of New York. New York City claims in the nature of taxes aggregating approximately $1,500,000 were settled for the sum of $578,000. Gross receipts taxes, Diesel fuel taxes and charges by the Public Service Commission amounting to $577,802.67 were satisfied for $86,670.40.

Suits Brought by Trustees

As a result of investigation and examination of witnesses pursuant to section 167 of the Bankruptcy Act, in the course of which twenty hearings were conducted and over eighteen witnesses examined and approximately 1300 pages of testimony taken, it was disclosed that substantial sums of money had been paid on account of antecedent debts shortly before the filing of the petition and during the pendency of the involuntary petition. Questionable interest payments had been made in 1947 to the holders of Adjustment Bonds and payments of fees and disbursements had been made to general counsel and special counsel of the debtor and others. In June 1951 the Trustee commenced 16 actions and 12 proceedings against creditors of Third Avenue as well as certain of its officers and directors. Some of this litigation is still pending undetermined but the total recovery to date has been the sum of $314,376.

Sale of the Yonkers Operation

At the beginning of the reorganization proceeding the Yonkers division of the system, being its only major trolley car operation, was causing the debtor to sustain very substantial operating losses. Motorization was indicated but the debtor in reorganization was in no position to raise the large amount of capital required. Immediate solution of the problem was necessitated by a resolution adopted by the Council of the City of Yonkers calling for the motorization of the lines. Commencing in December 1951, negotiations began with the Westchester Citizens Transportation Committee with respect to possible sale of the Yonkers lines to the committee. Extended discussions and study resulted in the sale of the stock of the Yonkers company for $50,000, the Third Avenue retaining the valuable Yonkers carhouse and power house, the substantial assets of Yonkers. Disputes over the details of the closing were determined by an order of this court on September 10, 1953 and an appeal taken by the Citizens Committee to the Court of Appeals was withdrawn.

Besides the proceedings above recounted there were the normal proceedings incident to a reorganization of this magnitude, such as the classification of creditors' claims, and the usual problems of the operation of what was said to be the largest privately operated surface transportation system in the world, such as sales of property, purchase of new buses, disposition of tort claims and actions, condemnation proceedings and franchise agreement disputes.

The Total Amount Which the Estate Can Afford

My guide in passing upon these applications has been the opinion of the Court of Appeals for the Second Circuit, *Finn* v. *Childs Co.*, 181 F. 2d 431. There the court says, 436:

> "In the process of fixing allowances it has been generally found desirable, first to determine the total amount which the estate can afford to bear and which it should justly pay for the benefit rendered to it, and

> thereafter to allocate this amount among the various claimants according to the value of the services which they performed."

Thus I must first determine the total amount which the estate can afford to bear. In doing so I must bear in mind the injunction of the *Childs* case not to exceed recommendations which have been made by the Securities and Exchange Commission without definite findings and conclusions showing why this step is deemed necessary. That was what the Court of Appeals said at page 438. Although the Court qualified the statement by stating "[a]s applied at least to the circumstances disclosed in this case", I know of no reason why, if the Commission's recommendations were entitled to that weight in the *Childs* case, they should not be entitled to the same weight here. I must therefore start with the Commission's finding as to the total amount that the estate as a maximum should be required to bear in this case. The Securities and Exchange Commission recommends the payment for services and disbursements of the applicants of the sum of $1,818,476.45. In the course of argument before me counsel for the SEC said, "With the one exception where we made no recommendation, we thought that the fees we were recommending, the aggregate of the fees that the Commission was recommending was pretty much the maximum, reasonably, that could be allowed out of this estate in this proceeding". Since that time the SEC has made the omitted recommendation and I feel safe in assuming that, if the amount recommended in toto before this addition was deemed to be the maximum allowable, the amount which includes the addition would certainly be deemed to be the maximum. I must start, therefore, with the proposition that, if I am to award more than $1,818,476.45, I must support the award by definite findings and conclusions showing why this step is deemed necessary.

The first subject on which such findings and conclusions must be made is the total amount which the estate can afford to bear and which it should justly pay for the benefit rendered to it.

In the *Childs* case the court stated that the fees allowed constituted a princely division of capital after noting that they amounted to 10% of the estate upon the value originally set and even approached 20% of the debtor's claimed value at the close of the reorganization. I must begin therefore by making a finding as to the value of the estate in order to be sure that the total amount of the awards shall not exceed a fair proportion. I can think of no better basis than the market value of the securities at the date of the consummation of the reorganization or as near to that date as such figures are available. It happens that December 31, 1956, is within a few days of the date of the consummation of the reorganization and figures are available for that date.

The market value of the Refunding Bonds on December 31, 1956, was $13,320,000. The market value of the Adjustment Bonds on that date was $8,725,000. There had been made, however, interim payments to the holders of the Refunding Bonds in the amount of $5,180,000, so that the estate which was actually preserved for the security owners by the efforts of those who now seek allowances amounted to the total of these three, or $27,225,000. These market values had, however, discounted the fact that the allowances that I am now considering would be payable out of the assets of the enterprise. These allowances had been publicly estimated in figures given out at the time of the proposed reorganization, at $1,150,000. Adding that back, we reach a total of $28,375,000 as the value of the estate for the purpose of determining the percentage allowable to those who have accomplished its preservation.

The amount recommended by the Securities and Exchange Commission, $1,818,476.45, amounts to but 6.41% of this total. That is surely not the maximum share of an estate which should be paid to those who, by stupendous efforts over 7½ years, have accomplished its preservation. I must, however, give heed to the views of the Securities and Exchange Commission. Weighing them as against my

own convictions as to the amount that the estate should pay, I reached the conclusion that $250,000 (plus $28.28 which it seemed convenient to add when I came to dividing the total among the claimants) should be added to the SEC's figure. If left to my own devices I would have fixed the total at a considerably higher point. As it is, the addition which I have made raises the percentage by less than one point from 6.41% to 7.29%.

It was well known to the SEC when it made its recommendations, as it is now to me, that, in addition to the applicants in this proceeding, there are others who have received from the estate payments of about $500,000 which would not have been made were it not for the proceedings in the bankruptcy court. These payments include $97,000 paid to W. C. Gilman & Company for engineering services rendered to the Trustee such as work done in preparation of the Trustee's plan of reorganization and testimony before this court and the Public Service Commission, $23,000 paid for appraisals, $15,000 paid for special audits, $21,500 paid for Public Service Commission costs, $33,000 paid as expenses of distributions to Refunding Bondholders, $29,000 paid for printing the report under section 167 of the Bankruptcy Act, $19,500 paid for printing the indenture under which the new bonds were issued, $64,000 paid for additional printing and about $100,000, on a time allocation basis, paid to persons on the Trustees' staff for services directly connected with reorganization matters.

No sensible person could shut his eyes to the facts that these payments are part of the costs of the reorganization and that they should be considered in fixing the amounts to be awarded to the applicants before me. They have been omitted from the figures in my calculations, however, in accordance with what seems to be customary in similar cases. To have included them would have made comparison with such similar cases difficult.

Next comes the consideration of the question adverted to in the *Childs* case on page 435, where it suggested, "that

a successful reorganization placed in jeopardy by high fees allowed can point only to a dreary round with the debtor emerging from bankruptcy only to re-enter it after the lawyers are paid". The court stated it in another way at page 436, when it spoke of "the total amount which the estate can afford to bear."

On December 31, 1956, after payments to the Exchange Agent and to the Distribution Agent required by the Joint Plan, the sum of cash and marketable securities was in excess of $5,000,000. On October 1, 1957, after nine months of operation of the new company, the comptroller of the new company testified that the enterprise should have in cash and liquid securities an amount equal to at least one month's gross revenues or between $2,250,000 and $2,500,000. He presented a pro-forma balance sheet as of December 31, 1957, which showed that after withdrawing $615,000 paid in dividends and after providing for sinking fund payments of $350,000, it was estimated that, on December 31, 1957, the organization would have about $4,000,000 in cash and marketable securities and that at the end of 1957 current assets would exceed current liabilities by almost $3,000,000. Counsel for the reorganized company stressed in argument the need for capital in order to make improvements which would make the enterprise more profitable. Granting the desirability of such a course, it should not be pursued at the expense of those who have made the very existence of the enterprise possible. Moreover, so far as concerns rolling stock, which makes up the bulk of the physical plant of a bus company, it is customarily bought under contracts of conditional sale and very little accumulated capital is necessary. With respect to other capital improvements there was testimony that, within the first nine months of 1957, $600,000 had been expended for that purpose and the joint plan of reorganization provided for prior lien borrowing up to $1,500,000 for capital improvements. I find that the estate can well afford to bear an aggregate payment of $2,068,504.73.

I have not overlooked the fact that, at the moment of writing, the transportation business in New York City is not as profitable as at the close of the reorganization period. That must be assumed to be temporary. The one thing on which all parties agreed was that the characteristic of the curve of future earnings of the system would be an unending series of peaks and valleys.

The Apportionment of the Amount Available for Compensation

There remains the matter of dividing this sum of $2,068,504.73 among the various claimants. As I have said, my own judgment, uninfluenced by the determination of the Securities and Exchange Commission, would have indicated the availability of a much higher figure. In apportioning the amount in accordance with my determination as to the relative contributions of the various claimants I have been in some instances forced to reduce the amounts recommended by the SEC. I wish to emphasize the point that my determinations are merely determinations of relative merit and do not necessarily indicate that I regard in any case the amount awarded by the SEC as excessive dollar-wise.

An appendix in tabular form annexed to this opinion shows the amounts requested by the various applicants, the amounts recommended by the SEC, and the amounts allowed by me.

In reaching the results indicated I was guided by the instructions of the Court of Appeals in the *Childs* case with respect to duplication of effort by counsel. I understand that, in spite of the policy of the Chandler Act toward democratization of representation in reorganization proceedings, each representative is not entitled to a full fee but that the amount available as proper compensation for the work necessary for the parties represented must be divided among counsel appearing for persons having a common interest.

The amount which I have allowed for representatives of the Refunding Bondholders, $606,303.11, does not exceed what would be properly payable if there were but one bondholders' committee and one counsel. The interest of the Refunding Bondholders in the estate as indicated by the market value of their bonds at the termination of the reorganization proceedings and the amount which was paid to them on account in the course of the proceedings is $18,500,000. The Refunding Bondholders went through the proceedings and were paid out substantially at par. The aggregate afforded their representatives is little more than 3.2% of their interest of $18,500,000. Moreover, some of the counsel for the Refunding Bondholders, notably Edward M. Garlock, who appeared for Refunding Bondholders as petitioning creditors, and Harold P. Seligson and Morton E. Yohalem, who appeared for the Amott Committee, contributed services which redounded to the benefit of the entire estate of a value at least equal to that of the services which they rendered to the Refunding Bondholders who were their only nominal clients.

To the representatives of the holders of the Adjustment Mortgage Bonds I have allowed $211,820.61. Their interest in the estate, as indicated by the market value of their bonds at the close of the reorganization proceedings, was $8,725,000. The amount allowed represents about 2.4% of this interest. Many times during the course of the reorganization proceedings it seemed doubtful whether anything could be salvaged for the holders of the Adjustment Mortgage Bonds. Had the bondholders been represented by a single committee and single counsel, compensation of 2.4% of the $8,725,000 salvaged would not have been excessive even though the rate of compensation had to be fixed below that customarily charged because of the principle that counsel representing a class of security holders and paid out of their interest by order of the court are entitled to less than counsel who have been chosen by their clients voluntarily and are paid by those clients alone.

The amount allowed to representatives of the tort claimants, $21,585.63, and the amount allowed to representatives of the stockholders, $8,250, might seem excessive in the light of the small size of the interest of tort claimants and the absence of any interest of stockholders but the representatives of these two classes rendered services of value to the entire estate, the representatives of the tort claimants in getting in the necessary consents and the representatives of the stockholders in affording a representation that was necessary even though the stockholders' lack of financial interest seemed evident from the start.

I will now take up the particular allowances in the order in which the claimants are listed on the table in the appendix.

LESTER T. DOYLE and I. HOWARD LEHMAN.

Reorganization Trustees

Mr. Doyle requested $312,000 and the SEC recommended payment of $195,000. I allow a still smaller amount, $180,000. This is not because I do not consider his services of a value at least equal to $195,000, the amount recommended by the SEC, but because funds are not available to pay everyone the amount to which he is entitled and because $195,000 would be relatively excessive in the light of the amount available for counsel and the Reorganization Trustees.

Mr. Doyle devoted himself to the duties of his office with complete fidelity and great industry. His knowledge of market conditions was of special value in connection with the appraisal of the various possibilities presented by the tentative and final plans and in inducing Fifth Avenue, in the negotiations leading up to the final plan, to increase its offer of 10 shares of its stock for each $1,000 Adjustment Bond to 15 shares for each $1,000. Counsel for Fifth Avenue acknowledges that Mr. Doyle was primarily responsible for thus enhancing the value of the Adjustment Bondholders' interest in the estate by 50%.

I cannot consider compensation of Mr. Doyle separate and apart from my consideration of the compensation of the other trustee, I. Howard Lehman. Mr. Lehman at the time of his appointment was one of the most prominent and able lawyers in New York City. He was president of one of the two great city bar associations, the New York County Lawyers Association. Mr. Lehman served as one of the trustees from June 21, 1949 to February 18, 1952. He brought to the position great skill as a lawyer and vast experience in matters of this kind. He was forced to devote himself almost exclusively to the affairs of the estate and his office became practically the executive office of the enterprise.

If compensation were to be awarded solely on a time basis I would be inclined to compensate Mr. Lehman at a higher rate than Mr. Doyle. Mr. Lehman's law practice was of a character where the constant demands of Third Avenue affairs made other gainful activities almost impossible. Mr. Doyle's banking business could be more easily managed and fitted into the periods made available when there were no Third Avenue engagements. Nevertheless, Mr. Doyle's services in the negotiations with Fifth Avenue had such a direct effect in the creation of assets in the estate that I am constrained to compensate both at the same rate. In this respect, my allowances differ from those of the recommendations of the SEC. The SEC recommended $195,000 for Mr. Doyle and $90,000 for Mr. Lehman. Mr. Doyle spent 7,850 hours and Mr. Lehman 3,725. The SEC allowances would have been at the rate of $25.48 an hour for Mr. Doyle and $24.44 for Mr. Lehman. I differ from the SEC not only in the rate of compensation but also as to the total compensation to be paid to the trustees. The sum of the SEC's recommendations is $285,000. While I find that sum a very modest one if we consider only the deserts of the trustees, the amount available for compensation to all of those who contributed to the success of the reorganization is limited and I find that, in order to compensate

others at a rate proper in the light of the relation between their contributions and those of the Trustees, the recommendations of the SEC for the Trustees are too high and must be cut to an aggregate of $263,000 rather than $285,000. This I would divide between Mr. Doyle and Mr. Lehman in accordance with the time which they devoted to the enterprise and I accordingly allow to Mr. Doyle $178,000 and to Mr. Lehman $85,000.

SAXE, BACON & O'SHEA

Counsel to Reorganization Trustees

No praise would be too high for the services rendered by this firm in these proceedings. The burden carried by them as counsel for the Trustees was enormous. I cannot imagine a more complicated legal situation than that with which they had to deal. The statement at the outset of this opinion with respect to the problems which were involved and their solution gives some idea of the difficulties present in this reorganization in excess of those which appear in the ordinary Chapter X proceeding. The delicate and vital legal relations with the city, the state and the Public Service Commission were maintained by counsel for the Trustees with consummate skill. Their day to day work was done with business-like promptness and dispatch and made the position of the court an easy one. They presented the complicated legal and financial problems lucidly both in oral statements to the court and in their excellent briefs. The task which they performed was gigantic and I find that every one of the 42,000 hours that they expended upon it was well spent. Almost half of this time was the time of partners and each one who acted in that capacity measured up to the highest standard expected of members of a firm engaged on such an important and difficult matter.

These lawyers were not volunteers but were appointed by the court as counsel for the court-appointed Trustees. While I realize that courts should not direct that counsel

in their position be remunerated out of the estate at the same high rate that their services would command if representing a private client, the fact that they came at the behest of the court takes them out of the class of those who, because of representation of a few of a group of security holders, get a position where their compensation is paid by the whole group.

The firm requested a fee of $1,074,280 and reimbursement of disbursements amounting to $22,377. The SEC recommended a fee of $800,000 and reimbursement of disbursements amounting to $14,218.28. The amount requested would have yielded about $25.50 an hour. The amount recommended by the SEC would have yielded $19 an hour. I find such a return for the efforts expended in this case to be entirely inadequate. With due allowance for the fact that the money being paid is the money of the security holders and not that of private clients who have retained the lawyers, and with due allowance for the fact that there are not funds available sufficient to pay those who have contributed to this successful result in accordance with what their services merit, I find that $100,000 must be added to the SEC's recommendation in order to give to counsel for the Trustees their fair share of the fund available for compensation of all. That will remunerate them at the rate of a little more than $21 an hour, a rate far below that on which firms of similar standing in New York City are compensated by private clients in these days of the depreciated dollar.

The firm opposed the SEC's recommendation that their request for reimbursement of disbursements be disallowed to the extent of granting only $14,218.28 instead of the requested $22,377. I find it unnecessary to resolve this controversy, since the estate would not stand any more than the additional $100,000 that I am allowing and it makes no difference whether it comes to the applicants as fee or reimbursement of disbursements. Counsel for the Trustees are allowed $900,000 as compensation for their services and $14,218.28 as reimbursement of disbursements.

EDWARD C. MAGUIRE

Former Labor Counsel to Trustees

Colonel Maguire was retained pursuant to two orders of this court dated June 23, 1949, as special counsel on labor relations and on any other matters affecting the business of the debtors concerning which he might from time to time be consulted by the Trustees. He rendered services as such special counsel from June 22, 1949 to December 1, 1950. As appears from the statement of the problems of the reorganization and their solution with which this memorandum began, the rates of wages payable to employees constituted one of the three crucial factors in the reorganization of the Third Avenue System. Colonel Maguire with great experience and ability in the field of labor relations contributed much to the success of the reorganization. He sought compensation of $75,000 and reimbursement of disbursements of $327.10. The SEC recommended payment of $45,000 compensation and the full amount of the disbursements. Again, if Colonel Maguire's services had been rendered in an ordinary case for a private client, I would have considered the SEC's recommendation as too low. In the light of what the estate can bear, however, and the relation of the benefits conferred by Colonel Maguire's services to the benefits conferred by others, I find the SEC's recommendation slightly too high. The SEC's figure would have awarded him $18 an hour for the 2412 hours devoted. More than half of the time devoted was probably that of associates and the case was peculiarly one where Colonel Maguire's special services were the important ones. I therefore allow him $43,000 which is at the rate of slightly more than $17.80 an hour.

THE HANOVER BANK

Indenture Trustee of Refunding Mortgage

The Hanover Bank in its role of Trustee of the Refunding Mortgage took a refreshingly active part in the proceedings. The trustee of a corporate mortgage when the

mortgagor is in difficulties finds itself in a position where it may, if so minded, wait for papers to be prepared and presented to it by counsel, execute those papers if advised that it may safely do so by the opinion of counsel and then collect a fee for the administrative act of signing but based on the amount of the estate involved. Here The Hanover Bank took the initiative in protecting the bondholders for whom it acted and in taking steps toward a successful reorganization that would benefit not only its bondholders but all of the creditors of the estate. The bank's services were of immense value to the court. It assembled the record and the evidence bearing on the Treasury Bond litigation. It prepared and filed an accounting going back to 1912. It made the $500,000 loan to the Reorganization Trustees; it is true that it was an unwilling lender but that does not alter the fact that the loan was made.

There was day to day activity throughout the whole 7½ years while the reorganization proceedings were pending. The present rate of the services for such a trustee on a non-defaulted issue would be about $3,000 a year or about $1,000 more than the $20,000 that the SEC recommended for compensation for The Hanover Bank. As indenture trustee it handled the investment and reinvestment in government securities of approximately $2,500,000. If that had been done by a trustee under a personal trust the commissions alone would have amounted to more than $50,000. I find that the SEC's recommendation for compensation of The Hanover Bank in an amount below that which would have been the compensation of a testamentary trustee is wholly inadequate and that The Hanover Bank for its services in this case where it has been so active is entitled for that activity to an additional sum which will bring its compensation up to $35,000. There again I find the compensation that I allow to be below that actually earned by The Hanover Bank and justified in its small size only by the fact that I must cut my coat according to the cloth at my disposal. I accept the SEC's recommendation that The Hanover Bank's disbursements to the extent of $3,353.13 be allowed.

KELLEY, DRYE, NEWHALL & MAGINNES

Counsel for The Hanover Bank

The case of counsel for the Trustee of the Refunding Mortgage is another one where the funds available are insufficient to compensate the claimants for their services. They have asked a fee of $150,000 and the SEC has recommended $100,000. Besides compensation for constant and effective assistance to the court in every phase of the reorganization, counsel for the Trustee of the Refunding Bonds have a very special claim for substantial remuneration. That lies in the success with which they prosecuted proceedings on behalf of their actual clients, the Refunding Bondholders. They took the laboring oar in the Treasury Bond litigation. The preparation of the case was difficult and complicated and the proposition of law on which their client's rights depended had been rejected by high judicial authority in this circuit. By winning that litigation in the Court of Appeals the firm preserved for the Refunding Bondholders about one-quarter of their security.

Next in importance was the reimbursement claim under which the Reorganization Trustees sought to recover over $12,000,000 which had been expended upon the property and which they claimed entitled them to a release of a corresponding sum from the mortgage. The claim if successful would have taken away from the Refunding Bondholders $2,500,000 of cash held by the Indenture Trustee which was actually distributed to them so, at a minimum, they would have lost $2,500,000 if counsel for the Refunding Mortgage Trustee had not secured a rejection of the claim from the court.

The preparation of the accounting for the Trustee, which was ordered by the court and went back to 1912, necessarily fell largely upon the shoulders of counsel and, in addition, there was the normal and continuous necessary attention to legal problems of the trustee of a first mortgage of a company in the bankruptcy court where resort to the security for a long time seemed imminent.

I agree with counsel in their statement that for the special services which they rendered to the bondholders they would have been entitled to charge private clients as much as $400,000. In the face of that a recommendation as low as the $100,000 as suggested by the SEC cannot be accepted and I allow the sum of $135,000 recognizing, as in other cases, that the amount is inadequate and that the only justification for its small size is the limitation consequent upon the inadequacy of the available funds to meet the just demands of all who have contributed to the success of the reorganization.

Counsel for the Indenture Trustee devoted 5100 hours to the cause and compensation of $135,000 to them makes their hourly rate $26.47, considerably higher than that involved in the allowance to counsel for the Reorganization Trustees, for instance. The difference in the rate is accounted for to some extent by the fact that much of the work done by counsel for the Trustees was of a routine character which could be done by capable associates while a much smaller proportion of the services rendered by counsel for the Indenture Trustee was of that character. The hours devoted to the work are, however, by no means the sole criterion. In the last analysis the important matter is the benefit conferred upon the estate. From that standpoint I take pleasure in recording the fact that among counsel for the security holders Mr. Heiss of the Kelley firm was second only to Mr. Garlock and Mr. Seligson in the assistance rendered to me.

HAYS, ST. JOHN, ABRAMSON & HEILBRON and EDWARD M. GARLOCK

Counsel for Petitioning Creditors

Objections have been filed to the granting of any allowances to Edward M. Garlock, and Hays, St. John, Abramson and Heilbron, hereinafter referred to as the firm, attorneys for the petitioning creditors. The objector, Milton E. Mermelstein, an Adjustment Bondholder, contends that Mr.

Garlock and the firm aided and abetted in the solicitation and procurement of Clarence F. Pyle as one of the petitioning creditors, that they were guilty of unprofessional conduct in connection with the institution of these proceedings and that they may have violated Sections 270-a and 270-d of the Penal Law of the State of New York and Canon 28 of the Canons of Professional Ethics adopted by the New York State Bar Association. A further objection is lodged against the application of Mr. Garlock on the ground that he assigned his claim for allowances as security for a loan allegedly in violation of Section 249 of the Bankruptcy Act.

The creditor's petition in the matter of the Third Avenue Transit System was signed by Aaron Melniker, William Melniker, and Clarence Pyle. There is no question about the propriety of Mr. Garlock's and the firm's representation of Aaron Melniker and William Melniker. The sole issue is the solicitation of Dr. Pyle as the third creditor. The petition was filed in this court on Monday, October 25, 1948. The first that Dr. Pyle had heard of the possible filing of a petition was during the week of October 18, 1948, when Edward Ruhfel, his investment counselor, telephoned him. Mr. Ruhfel recommended that he join other creditors in filing a petition and asked if he would like Mr. Garlock or Mr. Heilbron to discuss it with him. Mr. Ruhfel was a partner in the investment firm of Bendix, Lutweiler & Co., a client of Hays, St. John, Abramson and Heilbron. Mr. Heilbron telephoned Dr. Pyle later that week. On the morning of October 25, 1948, Mr. Garlock and Mr. Ruhfel brought the prepared petition to Dr. Pyle's home in Bryn Mawr. Dr. Pyle signed the petition after discussing it with Mr. Garlock and Mr. Ruhfel for a few hours. The idea of filing the petition did not originate with Dr. Pyle.

Canon 28 of the Canons of Professional Ethics of the New York State Bar Association proscribes solicitation of business by personal communications not warranted by personal relations. It has been recognized, however, that an attorney representing a creditor who is contemplating the

institution of bankruptcy proceedings may, under proper circumstances, solicit other creditors. *Guterman* v. *C. D. Parker & Co.*, 1 Cir., 86 F. 2d 546, cert. den. 300 U. S. 677; *People* v. *Edelson*, 313 Ill. 601, 145 N. E. 246; Opinions 281 and 717 of the Committee on Professional Ethics of the Association of the Bar of the City of New York. The motive of the attorney in soliciting is important in determining the propriety of the action. If the motive was the personal interest of the attorney, it would be both unprofessional and dishonorable. Opinion 281, supra. At the time the third petitioning creditor was solicited, Mr. Garlock was representing two creditors of Third Avenue Transit Corporation. The needs of those two creditors would have been promoted by enlisting the cooperation of a third creditor; therefore it was not unethical for Mr. Garlock to solicit Dr. Pyle. It is true that in seeking a third creditor a lawyer must conduct himself in a dignified and modest manner, without touting or high pressure salesmanship, and in such a way as to negate the implication of the self-advancement of the lawyer. There is, however, nothing to indicate a breach of that duty here. I hold that the actions of Mr. Garlock and Hays, St. John, Abramson and Heilbron were not such as to bar them from compensation.

The alleged violation of section 249 of the Bankruptcy Act which concerns only Mr. Garlock, has been rejected in accordance with my succeeding discussion of the allocation of fees between the Hays firm and Mr. Garlock.

Hays, St. John, Abramson & Heilbron requested an allowance of $325,000 for itself and Mr. Garlock jointly. Mr. Garlock filed a subsequent application in which he requested an allowance of $300,000 separate from the firm's allowance.

The firm contends that Mr. Garlock acted merely as counsel to the firm in its capacity of counsel of record to petitioning creditors, and that, pursuant to an oral agreement with Mr. Garlock, the firm was to receive one-half of their joint allowance. Mr. Garlock contends that he and the firm were co-counsel, that their agreement provided for

division of compensation in proportion to the services rendered and that the court should award separate allowances based on the services of each. A hearing was held to determine the effect of the agreement and the proportionate amount of services rendered by each.

The events leading to the formation of the oral arrangement in issue began about the early part of 1948. At that time Mr. Garlock was consulted by Judge Aaron A. Melniker, one of the petitioning creditors and a Refunding Bondholder, with regard to the filing of an involuntary petition under Chapter X. In about May, 1948, a decision was reached to proceed with the case and Mr. Garlock began preparation of the petition. After the petition was practically completed in October 1948, Mr. Garlock and Judge Melniker consulted the Hays firm upon the suggestion of Mr. Garlock that he could not undertake the case without an association with a firm. The principal acting on behalf of the firm at that time was Arthur Garfield Hays, now deceased. Another member of the firm, Seymour M. Heilbron, was present, however, at subsequent conferences at which the terms of the arrangement were discussed. Robert Lennox, a third attorney whose allowance is discussed later, was also retained, apparently because of a prior association in the practice of law with Judge Melniker. The Hays firm was formally retained by Aaron and William Melniker, petitioning creditors, subject to the firm's agreement to be co-counsel with Mr. Lennox. According to the written terms of the Hays retainer agreement, compensation was to be an appropriate allowance made by the court. The agreement between the Hays firm and Mr. Lennox provided that Mr. Lennox should receive twenty per cent of all fees awarded to either or both "subject to the approval of the court".

The firm and Mr. Lennox appeared formally as counsel of record and Mr. Garlock appeared as counsel. The firm now contends that, because of the manner of formal appearance, it is entitled to the award of the total allowance due

to itself and Mr. Garlock in the first instance and that Mr. Garlock would then receive his share from the firm pursuant to the agreement. This contention must be rejected as contrary to the agreement of the parties and the substance of their actual positions before the court. It is clear that the arrangement contemplated their acting as co-counsel with equal status and responsibility. As the case developed, however, Mr. Garlock assumed the primary burden of responsibility and performed the major part of the services. The firm accepted this situation although it continued to act as counsel of record. My conclusions in this respect are in accord with the findings of the SEC from their examination of the correspondence, register sheets and testimony.

As to the terms of the oral arrangement between the firm and Mr. Garlock, I find that they contemplated an equal division of compensation and an equal division of the work. The latter condition was not performed by the firm and the firm, as will be shown in my discussion of the allocation of the allowance, rendered a relatively minor proportion of the services. The possibility of a disparity in the actual contributions of the firm and Mr. Garlock also appears to have been within their contemplation inasmuch as I find that the division of fees in their arrangement was understood to be subject to the court's approval.

These findings are supported by the testimony of Mr. Heilbron as well as Mr. Garlock. In allowance hearings held on June 18, 1957, Mr. Heilbron testified that the parties contemplated an equal division of work, which included on the firm's part, in addition to professional services, the use of its law office and other facilities. Mr. Heilbron also testified then and stated in correspondence that the arrangement was made subject to the approval of the court. At the hearing held March 31, 1958, after the dispute arose, this statement was qualified to apply only if equal division would be unconscionable.

Even if the parties had not so provided in their agreement, the court in a reorganization proceeding has power to determine the amount of awards where judicial sanction of the alleged agreement would result in awards that would be grossly disproportionate to the attorneys' contribution to the estate.

Sections 241-250 of the Bankruptcy Act, 11 U. S. C. §§ 641-650, provide for the granting of allowances by the court only for services rendered which have benefitted the estate or contributed to a plan. The broad supervisory powers accorded the court under those provisions necessarily include the power to disregard the terms of attorneys' agreements which are contrary to the terms and policy of the Act.

Furthermore, if the agreement is to be interpreted as the firm contends, it assigns to one attorney an amount which cannot be considered as compensation for services rendered and thereby results in an unlawful splitting of the fee. Bankruptcy Act, § 62(c), 11 U. S. C. § 102(c); Canon 34, Canons of Professional Ethics, New York State Bar Association.[1] Section 62(c) provides:

> "c. A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, rendering services in a proceeding under this Act or in connection with such proceeding, shall not in any form or guise share or agree to share his compensation for such services with any person not contributing thereto, or share or agree to share in the compensation of any person rendering services in a proceeding under this Act or in connection with such proceeding, to which services he has not contributed: *Provided, however,* That an attorney-at-law may share such compensation with a law partner or with a forwarding attorney-at-law; and may share in the compensation of a law partner."

[1] The Canons of Ethics are applicable to cases in this court by the terms of Local General Rule 5.

It would be a clear evasion of the intent of this section if the court were to sanction a fee sharing arrangement whereby an attorney, having performed some service, received an allowance far in excess of that to which his contribution to the estate entitled him.

Finally the firm contends that, if its contentions as to the effect of the forms of appearance and the agreement are rejected and Mr. Garlock is entitled to a separate allowance, he is disqualified from receiving that allowance because he assigned his rights to part of it as collateral for certain indebtedness. The firm's contention that this constitutes unlawful fee-splitting is untenable. The assignment was merely as collateral. Even if it were an outright assignment, however, the assignee's rights in it did not arise out of a proceeding in which it failed to render service but out of an independent consideration—the loan. The contention that these assignments violate section 249 of the Bankruptcy Act, 11 U. S. C. § 649, is equally without merit. Allowances are not "claims" against the estate within the terms of this section,[2] and Mr. Garlock's right to an allowance was not sold or otherwise transferred but merely pledged as collateral. See In re Third Avenue, D. C. S. D. N. Y., 159 F. Supp. 440.

Insofar as I find that the enormous disparity between the relative shares of the services actually rendered by the firm and Mr. Garlock and the prospective estimate of their relative shares justifies the court in making separate allowances, my conclusions are in accord with the recommendations of the SEC. We differ, however, as to the actual valuation of the services. I award $150,000 to Mr. Garlock and

[2] Section 249 provides that, "Any persons seeking compensation for services rendered * * * in a proceeding under this chapter shall file with the court a statement under oath showing the claims against or stock of the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred." It is inconceivable that the right to compensation is to be considered one of the claims transfers of which all allowance applicants are required to disclose.

$10,000 to the Hays firm; the SEC recommended $115,000 to the former and $30,000 to the latter.

In making this award I have considered the value of the firm's offices and facilities which it contributed and the substantial proportion of lawyers' fees which overhead accounts for. Nevertheless, the professional services rendered by Mr. Garlock so overwhelmingly exceed those of the firm that I am constrained to allocate their fee as I have. Except for counsel for the Trustee, no other lawyer or firm of lawyers to whom I am making an award contributed more than Mr. Garlock to the successful reorganization of the Third Avenue System.

As stated previously, the preparation of the involuntary petition was virtually completed before the firm was even consulted and was solely the work of Mr. Garlock. Mr. Garlock was primarily responsible for the preparation and defense of the amended petition. Although these proceedings ended in a consent by the debtor, the petition was vigorously contested and its eventual success was due for the most part to the efforts of Mr. Garlock.

The firm's most active participation was in these early proceedings. Osmond K. Fraenkel was active on behalf of the firm in preparation of briefs and memoranda and he attended the hearings; but as between Mr. Garlock and the firm the correspondence and testimony indicate that Mr. Garlock was at all times primarily responsible for policy decisions and was the major participant.

Following the approval of the petition and the appointment of trustees Mr. Garlock continued to play a major role in the proceedings as representative of Refunding Bondholders. Mr. Garlock deserves credit for the preservation of the funds of this group through his part in the successful appeal from an order of the District Court requiring an involuntary loan from the Indenture Trustee. 198 F. 2d 703. The success of this appeal also had a salutary effect upon the future proceedings insofar as it led the way to putting the system on a firmer operating basis

through the negotiations with New York City and the union referred to above.

The firm participated to some extent in the prosecution of this appeal but Mr. Garlock prepared the brief and argued the case. Subsequent to 1951 the firm's participation was only occasional and insubstantial.

Mr. Garlock was a very active participant in the negotiations and plan hearings. He made valuable contributions particularly through his cross-examination of valuation experts on operational and financial matters. Mr. Garlock was also the only representative of his class who opposed the withdrawn Allen plan.

Formal appearances at the plan hearings were made by Mr. Sidney Struble, a member of the firm; but his participation was little more than that of an observer.

With regard to hours spent, although Mr. Garlock did not keep accurate time records, the SEC estimated his time as towards the lower part of 5,000-10,000 hours. On the basis of the thoroughness of preparation that his work before me showed I have no hesitation in finding that he spent at least 7,500 hours. This conclusion is also supported by the fact that, in addition to being at least as active as any other counsel throughout the proceeding, except for Trustees' counsel, Mr. Garlock's services began a considerable time before any other counsel entered the proceedings. Considering the contributions made to the estate as a whole, to the Refunding Bondholders, to the plans and to the successful institution of these proceedings, I find that $20 per hour is a minimum of reasonable compensation.

I find the number of hours spent by the firm in work that actually contributed to the proceedings to be less than the estimate of 1500 hours accepted by the SEC but characterized as "generous". Their early active participation and their contribution to the overhead of the co-counsel entitles them to $10,000.

The firm requests reimbursement of expense in the amount of $1904.77. In accordance with the recommendation of the SEC as to certain unexplained items I allow $1557.33.

Mr. Garlock requests $1420.95 which includes $650 in local telephone tolls and $600 in taxicab fares. The SEC recommends disallowance of the telephone tolls and that part of the taxicab fares which was not shown to have been necessary. I find that $200 is a fair estimate of the necessary taxicab fares and I allow $370.95.

ROBERT IRVING LENNOX (ESTATE)

Co-Counsel for Petitioning Creditors

The estate of Mr. Lennox asked for a fee of $75,000 and the SEC recommended a fee of $7,500. As previously stated, Mr. Lennox appeared with the firm of Hays, St. John, Abramson & Heilbron as co-counsel of record for petitioning creditors pursuant to a written agreement with that firm that he receive 20% of the allowance to counsel for petitioning creditors. This agreement specifically provided that the provision for division of fees was "subject to the approval of the court" and, as in the case of Mr. Garlock and the Hays firm, I find that it is not binding upon the court. There is some doubt in my mind whether the evidence sustains an allowance of $7,500 in the absence of testimony that Mr. Lennox might give if he were alive. I am happy, however, to accept the recommendation of the SEC. I understand from the instructions of the Court of Appeals in the *Childs* case that I am to accept the recommendations of the SEC except where I can make a finding which indicates their incorrectness. That I am unable to do in this case and I therefore apprehend that it requires no further discussion.

What I have just said will apply to most of the succeeding claims and I shall therefore refrain from discussing any of the claims where I have been unable to find a basis

for disagreeing with the SEC's valuation. That applies to all of the cases enumerated in the appendix where my allowance coincides with the recommendation shown to have been made thereon by the SEC.

HAROLD P. SELIGSON, EDMUND BURKE, JR., AND MORTON E. YOHALEM

Counsel for Amott Committee

This group I class with Mr. Garlock as having been of more assistance to the court than any other claimants' lawyer or group of lawyers to whom I am making allowances. Mr. Seligson's familiarity with matters of this kind was particularly valuable and Mr. Yohalem's experience was very helpful where difficult questions in connection with the issuance of securities arose.

It is true that, largely on account of the services of these counsel, the time came when it was obvious that the Refunding Bonds were going to be paid out in full in cash or securities. Counsel did not, however, relax their efforts at this point and some of the most valuable services rendered by the group were in the difficult and complicated applications to the Public Service Commission and the Securities and Exchange Commission in connection with the approval of the issuance of the securities which were an integral part of the final reorganization plan. The group took a pre-eminent part in every division of the proceedings before me. They opposed the Trustee's borrowings from The Hanover Bank and supported Mr. Garlock with a brief in the successful appeal from the order authorizing the loan. In the early stages they kept the question of liquidation constantly alive and served a very useful purpose in spurring the junior creditors into activity. As soon as there was any basis for such an application they applied for cash distributions to the bondholder. They succeeded in obtaining six successive cash distributions aggregating 35% of the principal amount of the outstanding bonds or about $5,000,000.

They opposed the Trustee's first plan of reorganization with detailed and constructive criticism: No group or lawyer was more active or helpful in the plan hearings. The corporate structure of the reorganized company was the corporate structure which this group urged on the Trustee prior to the filing of the Trustee's amended plan. Their contributions with respect to the form and substance of the new indenture were invaluable. In the plan hearings they marshalled the forces representing the holders of the Refunding Bonds and succeeded in obtaining agreement upon expert witnesses. It was on their motion that the court declared the debtor insolvent and paved the way for a simple and expeditious settlement. I cannot help feeling that the SEC's recommendation of but $100,000 as compensation for this group was based too largely upon the fact that they reported but 5,410 hours spent. Counsel for the SEC protested that the time spent had not been and should not be a determining factor in its recommendations and yet it is the only basis on which I can explain such a small allowance for such excellent and extensive services. I find their value to be in excess of $150,000 but I am confined to an award of that amount by the limitation of the funds on hand. I recognize that that will result in compensation of $27.73 an hour, a comparatively high rate in this proceeding where funds are so limited, but the award is justified for what the group has accomplished. Lawyers ought not to be penalized because their skill enables them to obtain results with a minimum expenditure of time.

I can find no fault with the SEC's recommendation of reimbursement of $1,540.26 instead of the $3,740.26 requested.

MURPHY, BLOCK, SULLIVAN & SAWYER, DANIEL W. BLUMENTHAL and VICTOR S. GETTNER

Counsel for O'Connell Committee

This group requested a fee of $135,000. The SEC recommended but $45,000, cutting the amount by two-thirds. The field for counsel for the Refunding Bondholders was pretty well covered by Mr. Garlock and the Seligson group. It may have been altruistic forebearance that kept the Sullivan group from contributing in competition with the others but the fact is that their contribution impressed me as about one-third as extensive as that of either of the other two. The Sullivan group suffers also from the fact that its claim as to the number of hours employed rests largely upon estimate, a state of affairs most harmful to the presentation of claims for compensation and yet one that seems to be the rule rather than the exception. I gave the Sullivan group more credit than does the SEC for bringing about harmony in the group of Refunding Bondholders and for refraining from engaging in merely duplicating services and arguments. I find that the SEC gave insufficient recognition to those elements and therefore find that the allowance should be $50,000 rather than $45,000.

STONE & WEBSTER SERVICE CORPORATION

Engineering Experts for Refunding Groups

Stone & Webster Service Corporation was employed by the Refunding Bond groups and rendered engineering services in connection with future earning prospects for the system. When retained it was understood that the fees of the organization would be allowed by the court but there was a statement in the letter of engagement that normal charges of the organization were on a per diem basis amounting to three times the payroll of the particular individual who happened to be working on the job. Charges so calculated would amount to $38,000, but the organization requested $50,000 on account of the delayed and spasmodic

character of the work which rendered it impossible to use most effectively the organization's engineering staff on other work. The SEC recommends a payment of $35,000 stating, however, that the work was well done and of value to the estate. I can see no reason why more than the anticipated per diem rate should be charged and I find that the Commission gave too little weight to the fact that all concerned must take less than their actual deserts due to the fact that the estate is insufficient to pay to anybody the full value of the services rendered to the reorganization. I therefore allow Stone & Webster Service Corp. the sum of $34,000. I concur in the view of the Commission that they should be awarded as reimbursement for expenses the sum of $514.34 instead of the $2,144.34 requested.

REIS & CHANDLER, INC.

Financial Experts for Refunding Groups

The Reis & Chandler organization was hired jointly by the Refunding Mortgage Bondholder group to advise principally with respect to financial matters, such as rates of capitalization and valuation. Mr. Reis prepared reports and exhibits and testified before me and also before the New York Public Service Commission. Compensation in the amount of $50,000 is requested. The SEC recommends payment of $12,500. This large reduction from the amount sought is explained, I think, by comparison with the work of a similar character performed by the Stone & Webster organization. I accept the judgment of the SEC as to the relative value of the services as substantially correct and, in accordance with my reduction of the amount to be allowed to the Stone & Webster Service Corp. from $35,000 to $34,000, I reduce the amount to be allowed to Reis & Chandler, Inc. from $12,500 to $12,000. I concur in the SEC's recommended reduction of the amount of disbursements from the $214.96 asked to $84.79.

COLONIAL TRUST COMPANY

Successor Trustee of the Adjustment Mortgage

This Trust Company originally requested an allowance of $25,000 but subsequently withdrew its application.

WAGNER, QUILLINAN & TENNANT

Counsel for Colonial Trust Company

This firm requested compensation of $65,000 and the SEC has recommended an allowance of $22,500. This would allow the firm only about $11.25 an hour for the 2,000 hours spent on the case. The SEC explains this low rate of compensation on the ground that there was no unanimity among the representatives of the Adjustment Bondholders and that they did not make for that reason the substantial contribution to a final solution that the representatives of the Refunding Bondholders did. It is true that the Adjustment Bondholders were not in the driver's seat. On the other hand, their precarious position made representation all the more important. Mr. Nussenfeld, who made most of the appearances for his firm, was of great assistance to me from the time that the reorganization came under my care. His statements of law and fact were clear and reliable. I find that the routine services of his firm in representing the Indenture Trustee and in such matters as opposition to the constant pleas for liquidation made by the Refunding Bondholders were of a value in excess of the $22,500 recommended by the SEC. That recommendation to my mind takes no account of the fact that it was at the insistence of Mr. Nussenfeld, supported by only one other representative of the Adjustment Bondholders, that the Trustee was induced to hold out for 15 shares of Fifth Avenue stock for each Adjustment Bond instead of the 14 shares which Fifth Avenue was at that time willing to give. Success in obtaining the 15 shares meant an enhancement of a recovery of the Adjustment Bondholders by half a million dollars. I find that Mr. Nussenfeld's services in this respect added

enough to the services I have already described to bring their fair value to a figure in excess of $30,000. In the light of the necessity of the reduction of every allowance below the claimant's just deserts, I award the firm of Wagner, Quillinan & Tennant the sum of $30,000. I concur with the SEC in the reduction of the disbursements claim from $148.95 to an allowance of $132.11.

CRAVATH, SWAINE & MOORE

Counsel for Chemical National Bank, Former Indenture Trustee

This firm requests an allowance of $7,500 and the SEC has recommended the payment of $5,000. In the early days of the case the firm filed a proof of claim on behalf of the Adjustment Bondholders and took the required action to protect the rights of the bondholders in lawyer-like fashion. Besides that, the firm did little more than follow the proceedings and their services ceased with the resignation of the Chemical Bank as trustee. They report having spent 300 hours of time on the case without allowing anything for services in connection with the resignation of their client. I find that the SEC has failed to give sufficient weight to the fact that there are not enough funds available and has awarded this firm more than its share. If the lawyers who were active in the proceeding were paid for similar work at the rate recommended their fees would be more than the estate could bear. In recognition of that fact I am constrained to find that the maximum allowance under all of the circumstances in the case is $4,500 and I award it that sum.

AMEN, GANS, WEISMAN & BUTLER

Counsel for Brown Committee

Hiram S. Gans has been held disqualified in a decision reported under the title, In re Third Avenue Transit Corporation, 159 F. Supp. 440.

KRESEL & MEYERSON

Co-Counsel for Tinker Committee

This firm requested a fee of $128,000 and the SEC has recommended $25,000. In doing so counsel for the SEC stated that he had noted Mr. Kresel's activities with respect to the presentation of testimony and evidence during plan hearings and that he thought it fair to state that Mr. Kresel's activities on behalf of Adjustment Bondholders were probably greater than any other Adjustment Bondholder representative in this area. It was probably in accord with this judgment that the SEC recommended a payment for Mr. Kresel's firm in excess of that recommended for any other lawyer or firm representing Adjustment Bondholders. I agree with the SEC and go farther and say not only that Mr. Kresel's activities were greater but that in sum total Mr. Kresel contributed more than any other representative of the Adjustment Bondholders to whom I am making an allowance. His skill in the examination of expert witnesses and in the presentation of complex financial business problems lightened the labors of the court. His prestige and vast experience were of great value to his clients. I can only think that in recommending the fee of $25,000 the SEC did not realize how much assistance Mr. Kresel gave the court particularly in connection with the testimony with respect to the value of the property. Having in mind the over-all accomplishment for the benefit of the Adjustment Bondholders I find that the share of the available compensation which should be awarded to the firm of Kresel & Meyerson is $50,000.

PACK & STRUMPF

Counsel for Leo Brecher, an Adjustment Income Bondholder

This firm represented Mr. Leo Brecher, an individual bondholder who became very active in the proceedings. He presented a plan on his own behalf and was later represented by Pack & Strumpf. They did not appear in the

proceedings until the fall of 1955. I cannot find any services of Mr. Pack which contributed benefit to the estate in any substantial amount except in connection with the increase in Fifth Avenue's offer from 14 shares of its stock to 15 shares of its stock for each Adjustment Bond. There Mr. Pack joined with Mr. Nussenfeld in urging the Trustee to stand out for the greater amount. When compared with the services of others, like Mr. Kresel and Mr. Nussenfeld, Mr. Pack's services do not merit a share of the amount available for compensation in excess of $7,000 and I allow him that sum.

CHARLES POLETTI, HOFFMAN, BUCHWALD, NADEL & HOFFMAN, and BUCHMAN & BUCHMAN

Co-Counsel for Various Adjustment Bondholders

The above named claimants, attorneys for certain holders of Adjustment Bonds, seek an allowance of $90,000 and reimbursement of expenditures of $479.73. The SEC has recommended the payment of $12,500 and the requested amount of disbursements.

The claimants estimate the value of their services with respect to the plan at $15,000 but claim that they enlarged the estate by over half a million dollars for which they claim to be entitled to an additional 15% of the amount of the increase, or $75,000.

Claimants are entitled to little, if any, compensation in connection with the preparation of a plan. The plan referred to was rejected as not providing for a sufficiently strong commitment by the proposed underwriters and I cannot find that the services in connection with it enured in any way to the benefit of the estate.

Claimants did, however, render other services which were of value. It was on the strength of these that the SEC recommended that they be paid $12,500.

These services were rendered in connection with provision for payment of dividends upon the stock of the Fifth Avenue Coach Lines, Inc., which were distributed to the

holders of the Adjustment Bonds and to certain other creditors pursuant to the plan of reorganization.

The plan contemplated postponement of consummation pending possible appeals from the order directing its consummation. The plan expressly provided that bonds which were to be issued to the holders of Refunding Bonds of the debtor should bear interest from November 1, 1956. There was no express provision, however, with respect to dividends which might be paid upon stock of the Fifth Avenue Coach Lines, Inc., which would be issuable to the holders of the Adjustment Bonds and other creditors.

The plan was approved by order dated July 26, 1956. Thereafter, and on or about August 30, 1956, claimants circulated among all interested parties a statement entitled "Statement re Fixed Income Data for Dividends on Fifth Avenue Stock to Adjustment Income Bondholders", saying that they proposed to submit that statement to the court when it met on September 5, 1956. This statement called attention to the lack of an express commitment with respect to dividends on the stock of Fifth Avenue Coach Lines, Inc., prior to the time of consummation of the plan.

At the hearing on September 5, 1956, a letter from the president of the Fifth Avenue Coach Lines, Inc., was submitted which stated, in substance, that Fifth Avenue Coach Lines, Inc., would not declare any dividend on the shares of its capital stock in excess of $2.50 per share per annum prior to the consummation of the plan of reorganization, that Fifth Avenue Coach Lines, Inc., would declare dividends in respect to the stock to be issued pursuant to the plan at a rate of not less than $2.50 per share per annum for the period November 1, 1956 through December 31, 1957, regardless of when the plan of reorganization was consummated and, finally, that the record date for the regular quarterly dividend for the fourth quarter of 1956 would not be earlier than December 20, 1956, before which it was expected that the plan would be consummated. The statements were made subject to various conditions, among

which was that dividends would continue to be paid on the outstanding stock of Fifth Avenue Coach Lines, Inc., for the period ending December 31, 1957, and that satisfactory legal methods could be worked out without delaying such payments.

At the hearing of September 5, 1956, counsel for Fifth Avenue Coach Lines, Inc., was asked, in substance, to construe the arrangement as embodied in the plan and the letter of the president. He explained the fact that the problem was made difficult because of the importance of declaring dividends on the Fifth Avenue stock before it was issued. He said, however, that all of the dividends, except that for the last quarter of 1956, would be delayed until the end of March 1957, when it was expected that the plan would have been consummated. At that time he said the holders of the new stock would receive a postponed 50¢ extra dividend applicable to the year 1956, plus the 50¢ dividend for the first quarter of 1957, and would then in normal course receive the regular quarterly dividends for the other three quarters of 1957. He also said that there was an excellent chance that the plan would be consummated by the end of December and that for that reason Fifth Avenue Coach Lines, Inc., would not make the fourth quarterly dividend for 1956 payable to stockholders of record before December 20th. He said that, in the event the plan was not consummated before the end of March 1957, Fifth Avenue Coach Lines, Inc., would hope to work the matter out by the issuance of stock in escrow and declaration of the dividends upon the escrow stock.

As a matter of fact, the plan was consummated on December 17, 1956, so that the new stockholders received the dividend payable December 20th and all of the dividends payable during 1957.

The consummation on December 17, 1956 was voluntary on the part of the Fifth Avenue Coach Lines, Inc. Under the terms of the plan and the agreement of Fifth Avenue Coach Lines, Inc., the consummation could have been post-

poned until the determination of an application for review of the consummation order which was then pending in the Supreme Court of the United States. The date of consummation would not actually have become final until March of 1957.

Claimants' argument is that, but for the fact that they had extracted from Fifth Avenue Coach Lines, Inc., a commitment that the 1956 extra dividend and first quarter of 1957 dividend would be paid on the new stock, Fifth Avenue Coach Lines would have postponed the consummation until after the record dates for payment of those dividends. Claimants also argue that it was because of their efforts that Fifth Avenue Coach Lines, Inc., was induced to postpone the record date for its last quarter 1956 dividend until after the actual consummation.

Fifth Avenue Coach Lines, Inc., and the SEC both give credit to claimants for the latter service but both deny that claimants are entitled to credit for getting the 1956 extra dividend and the first quarter 1957 dividend for the new stockholders. Counsel for the Fifth Avenue Coach Lines says that it was so fearful that a rival offer might be made and was also so anxious to get into operation of the debtor's bus lines that the consummation date would have been advanced even if it had cost Fifth Avenue Coach Lines, Inc., the 1956 extra dividend and the first quarter 1957 dividend and that, therefore, the commitment that claimants had extracted was not the proximate cause of the payment of the dividends.

I am inclined to believe that that is so and that, therefore, claimants are not entitled to any percentage of the amount of those two dividends on the theory that they brought them into the estate. On the other hand, claimants did raise an important point with respect to the construction of the reorganization plan and did obtain a commitment from Fifth Avenue Coach Lines, Inc., which amounted to very valuable insurance against the possibility of loss of the dividends pending a postponement of consummation if

consummation actually had been postponed. This does not seem to have been recognized by the SEC in its recommendation. I find that claimants' services in that respect were of the reasonable value of $12,500 and therefore award them a total compensation of $25,000.

WILLIAM MERTENS

Counsel for Tort Claimants Committee

Judge Mertens requested a fee of $40,000 and the SEC has recommended payment of $10,000. The payment of such a small amount would not give adequate recognition to the services rendered by Judge Mertens in securing the adoption of the Joint Plan. In my judgment Judge Mertens' activities, early in the reorganization proceedings, which resulted in a plan for liquidation of the tort claims by permitting litigation to proceed in the courts where it was pending, entitle him to a payment of $10,000. Even more valuable, however, was his aid in securing adoption of the Joint Plan. Concurrence of two-thirds of the tort claimants was necessary. Unfortunately, the enterprise had been so over-capitalized that the amount available for tort claimants was small, indeed so small, that many of them hardly felt it worth while to register a vote on the plan. It was Judge Mertens' skilled activity in stirring these claimants out of their lethargy that obtained the concurrence of the necessary two-thirds and made possible the successful reorganization. I allow him $20,000 for his services.

MARSHALL & STEVENS, INC.

Expert for Stockholder Group

This organization sought a fee of $3,680 and return of disbursements of $1,128. The SEC recommended payment of $1,500 to include both services and disbursements. The representative of this organization gave testimony as to the earning power of the enterprise which was simply fantastic. Indeed, such testimony would have to be fantastic to indi-

cate that there was anything in the picture for the stockholders. Counsel for the SEC suggests that, just as stockholders even though in fact there is nothing there for them are entitled to some representation, so stockholders are entitled to some expert testimony. I am inclined to doubt that and would be disposed to deny any compensation to this claimant. Claim is made, however, for reimbursement of $1,128 spent on travel from a distance to testify. The SEC lumped this with such compensation as it awarded on the ground that the estate ought not to be burdened with the expense of bringing expert witnesses from distant points. I do not feel that the claimant should be penalized to the extent of saddling it with out-of-pocket disbursements and thus I award the sum of $1,100 in response to the claim for both compensation and disbursements.

A. PHILIP WOOLFSON

A Stockholder

I agree with the SEC that Mr. Woolfson rendered no services entitling him to compensation.

JAMES HODES

Chief Operating Officer

At the commencement of the proceeding Mr. James Hodes was appointed Additional Trustee pursuant to the provisions of section 156 of the Bankruptcy Act, 11 U. S. C. § 556. He was appointed, as permitted by section 189, 11 U. S. C. § 589, to operate the business. He had been a director and officer of one of the debtor corporations and about two years after his appointment, when it appeared that the Trustees were about to bring law suits against the directors of the debtor, Mr. Hodes resigned as Additional Trustee and was engaged by the Trustees as an employee and as their Chief Operating Officer. As an Additional Trustee and as Chief Operating Officer he received $20,000 a year. He continued to receive that during

1954. After suit had been brought against him it was questionable whether the Trustees should continue Mr. Hodes as Chief Operating Officer and, as a result of that, negotiations ensued which resulted in a settlement of the law suit so far as Mr. Hodes was concerned. As part of the settlement Mr. Hodes waived all claim that he might have to additional compensation for the entire period prior to September 1, 1954. In July of the next year, 1955, Mr. Hodes' salary, with the approval of the court, was increased from $20,000 to $24,000 a year. At that time it was definitely understood between Mr. Hodes and the Trustee that there would be no claim for additional compensation from that point forward.

Mr. Hodes has, nevertheless, sought allowance of $17,333.33 for additional compensation. As a matter of law he is precluded from receiving additional compensation for the entire period of his service except the period from September 1, 1954 to July 1, 1955. Since $24,000 a year was fixed as the full value of his services on July 1, 1955 and he received $20,000 a year for the period from September 1, 1954 to July 1, 1955, the maximum to which he could be entitled would be additional compensation at the rate of $4,000 a year for that period. I find, however, that he was a salaried officer throughout the entire period, that the Trustee considered his salary to be an adequate one and that when the Trustee felt that there was some basis for an increase the Trustee appeared before me and made the appropriate request. Accordingly, I deny the application for an allowance. In this I accept the recommendation of the SEC.

ALLEN & CO.

Underwriter of Withdrawn Plan of Reorganization

Allen & Co., underwriter of the withdrawn "Allen Plan", applies for compensation of $75,000 and disbursements of $21,551.45. The SEC recommends denial of the application.

Claimant states that, in September 1954, it began efforts which resulted in the development of the Second Amended Plan of Reorganization. In February 1956, claimant entered into an underwriting agreement with the Trustee in which claimant committed itself on condition that the Second Amended Plan of Reorganization be approved before certain dates. On March 19, 1956, the court held the Second Amended Plan as modified to be "worthy of consideration" and submitted it to the Public Service Commission and the Securities and Exchange Commission. The Public Service Commission found the plan to be in the public interest, but the SEC found that it was not fair and feasible. The plan was withdrawn and was never approved by the court.

In order to qualify for compensation from the estate, a claimant must, in addition to having participated in the proceedings to the benefit of the estate, fall within one of the designated classes of persons entitled to compensation under Sections 241, 242, 243, 11 U. S. C. §§ 641, 642, 643. Claimant applies as a party in interest within section 242. Section 242 provides:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—
>
> (1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;
>
> (2) by any other parties in interest except the Securities and Exchange Commission; and
>
> (3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

"Parties in interest" is not defined in the act[3] but I have serious doubt as to whether it was intended to include a party whose interest in the debtor was solely to obtain the profits from underwriting a plan of reorganization. I find support for this doubt in *In re Equitable Office Bldg. Corp.*, D. C. S. D. N. Y., 83 F. Supp. 531, 571-75, aff'd on opinion below, *sub nom., Aranow, Brodsky, Einhorn & Dann* v. *Equitable Office Bldg. Corp.*, 2 Cir., 174 F. 2d 827. In that case, compensation was denied to the attorneys for a group of stockholders who sponsored a plan that was not approved. It appeared that the primary interest of the group was in securing the underwriting commission. Chief Judge Knox found the position of one claimant to be similar to that of "a bidder at an auction sale * * * who finally is outbidden", and said that he was "unable to find or devise any legal principle whereby these petitioners could receive compensation from this estate". *In re Equitable Office Bldg. Corp., supra,* at 574-75. The position of Allen & Co., which was solely interested as a potential underwriter, is much the same as that of the claimants in the *Equitable* case.

Assuming, however, that the claimant qualifies as a party in interest, section 242 further requires that the services rendered and costs and expenses incurred be either in connection with the administration of the estate or in connection with a plan approved by the judge.[4] The services and costs here were not in connection with administration of the estate. The withdrawn Second Amended Plan of Reor-

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[3] Section 207 permits a "party in interest" to intervene with approval of the judge. The term as used here refers to "others than creditors or stockholders". *Rudnick* v. *Coney Island Boardwalk Corp.*, 2 Cir., 181 F. 2d 775. Allen & Co. never intervened as a "party in interest" under this section.

[4] In this respect section 242 is much narrower than section 243 which permits compensation to creditors, stockholders and their attorneys for "suggestions for a plan or of proposals in the form of plans" without the additional requirement that the plan be approved by the judge.

ganization was never approved by the judge. Allen & Co. is therefore left with its contention that its services were valuable in connection with the final Plan of Reorganization in that features of the Second Amended Plan were incorporated into the final plan. The similar provisions, however, do not appear to be of a substantive nature. Although the original proposal of Fifth Avenue Coach Lines, Inc., was to carry out a plan similar to that of Allen & Co., the final plan, as developed from the Adjustment Bondholders' substitute plan, differs substantially. There is no basis for finding that any of the claimant's services were rendered "in connection with a plan approved by the judge". I must therefore deny the application for compensation.

The application for reimbursement of expenses must also be denied because the expenses were not in connection with the final plan. Despite, In re Donohoe's Inc., D. C. D. Del., 29 F. Supp. 677, 688, decided under old section 77B, 48 Stat. 912, I cannot find that the requirements of section 242 for reimbursement of expenses are any less stringent than the requirements for compensation for services.

ESTATE OF JOSEPH NEMEROV, LOUIS H. O. FISCHMAN, EMANUEL L. GREENE and SCHWARTZ & HOLTZ

Claimants for Services in Proceeding in New York Supreme Court

The Estate of Joseph Nemerov asks $11,000, Louis H. O. Fischman and Emanuel L. Greene ask $2,000, and Schwartz & Holtz ask $1,500, for work as attorneys. The amounts sought were awarded by the New York Supreme Court for services in a proceeding to obtain approval of a merger between the Third Avenue Transit Corporation with its subsidiary, Surface Transportation Corporation. The Court of Appeals, in Doyle *v.* Nemerov's Executors,

2 Cir., 223 F. 2d 54, held that the state court's awards were conclusive adjudications of the validity and amount of the awards as in personam claims against the debtor.

Claimants applied for priority classification of the awards as "six-months' claims". I denied these applications by a memorandum dated November 5, 1956 but stated that I expressed no opinion as to whether claimants would be entitled to any allowance when the court made an order fixing a hearing for the consideration of applications for allowances for services rendered, under section 243 of the Bankruptcy Act, 11 U. S. C. §643.

The services were rendered and the award made between the time of the filing of the petition for reorganization under Chapter X and its approval, the petition having been filed on October 25, 1948, the state court proceeding for the approval of the merger having been begun in May, 1948, the merger having been approved and the awards made on February 16, 1949 and the petition under Chapter X having been approved on June 21, 1949.

Section 243 permits the judge to allow reasonable compensation for services rendered "by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans * * * or in connection with the administration of the estate".

The claimants say that the plan approved in this case made use of the state court approval of the merger which they had been instrumental in obtaining. Their theory thus is that they have contributed to the success of the plan.

That is not enough. An allowance can be made only to creditors or stockholders or their representatives and only for their services "in connection with the submission by them of suggestions for a plan".

Claimants are creditors, and, I assume for the purposes of this decision, are attorneys for creditors or stockholders,

but the services for which they seek compensation were not rendered "in connection with the submission by them of suggestions for a plan." The "plan" referred to in the act is a plan of reorganization under Chapter X. The services were not rendered in contemplation of making suggestions for such a plan. They were rendered for the benefit of a concern which was struggling to keep out of the bankruptcy court and were rendered in reliance on that concern's credit like all the rest of the services rendered between the filing of the petition and its approval. Under section 201, 11 U. S. C. §601, they are provable claims rather than claims for compensation for services rendered in connection with the submission by the claimants of suggestions for a plan.

The SEC and Its Counsel

Though I have been forced to differ from the recommendations of the SEC in many of the instances, I wish to pay tribute to the careful and helpful analysis that the Commission made of the claims. Indeed, I take this opportunity to express my gratitude for the active and intimate participation of the Commission and its counsel in the reorganization proceedings. If any proof were needed of the wisdom of Congress in providing for representation of the public by the Securities and Exchange Commission in reorganization proceedings, it has been furnished in this case. I would have felt helpless without the aid given unstintingly by Mr. George Zolotar and Mr. Richard V. Bandler, counsel for the Commission. Each has cheerfully rendered, at the usual modest salary of a public servant, services equal in value to those of any to whom awards are made by this decision.

June 30, 1958.

E. J. Dimock
United States District Judge

APPENDIX

Applicant		*Amounts Requested*	*SEC's Amounts Recommended*	*Amounts Allowed*
Trustees and Counsel				
Lester T. Doyle, Reorganization Trustee	Fee	$ 312,000.00[1]	$ 195,000.00[1]	$ 178,000.00[1]
I. Howard Lehman, Former Reorganization Trustee	Fee	133,500.00[2]	90,000.00[2]	85,000.00[2]
Saxe, Bacon & O'Shea, Counsel to Reorganization Trustees	Fee	1,074,280.00[3]	800,000.00[3]	900,000.00[3]
	Disb.	22,377.00[4]	14,218.28[4]	14,218.28[4]
Edward C. Maguire, Former Labor Counsel to Trustees	Fee	75,000.00[5]	45,000.00[5]	43,000.00[5]
	Disb.	327.10[6]	327.10[6]	327.10[6]
Refunding Mortgage Bondholder Representatives				
The Hanover Bank, Indenture Trustee	Fee	50,000.00	20,000.00	35,000.00
	Disb.	3,353.13	3,353.13	3,353.13
Kelley, Drye, Newhall & Maginnes, Counsel for The Hanover Bank	Fee	150,000.00	100,000.00	135,000.00
Hays, St. John, Abramson & Heilbron, Counsel for Petitioning Creditors	Fee	325,000.00	30,000.00	10,000.00
	Disb.	1,904.77	—	1,557.33
Edward M. Garlock, Counsel for Petitioning Creditors	Fee	300,000.00	115,000.00	150,000.00
	Disb.	1,420.95	—	370.95
Robert Irving Lennox (Estate), Co-Counsel for Petitioning Creditors	Fee	75,000.00	7,500.00	7,500.00
Arnott Committee for Refunding Mortgage Bondholders	Fee	39,500.00	7,500.00	7,500.00
	Disb.	2,248.89	1,748.89[7]	1,748.89[7]
Harold P. Seligson, Edmund Burke, Jr. and Morton E. Yohalem, Counsel for Arnott Committee	Fee	260,000.00	100,000.00	150,000.00
	Disb.	3,740.26	1,540.26	1,540.26
O'Connell Committee for Refunding Mortgage Bondholders	Fee	30,000.00	4,000.00	4,000.00
	Disb.	1,995.03	1,995.03	1,995.03
Murphy, Block, Sullivan & Sawyer, Daniel W. Blumenthal and Victor S. Gettner, Counsel for O'Connell Committee	Fee	135,000.00	45,000.00	50,000.00
	Disb.	138.39	138.39	138.39

Opinion on Applications for Compensation and Allowances.

Applicant		*Amounts Requested*	*SEC's Amounts Recommended*	*Amounts Allowed*
Stone & Webster Service Corp. Engineering Experts for Refunding Groups	Fee Disb.	50,000.00 2,144.34	35,000.00 514.34	34,000.00 514.34
Reis & Chandler, Inc. Financial Experts for Refunding Groups	Fee Disb.	50,000.00 214.96	12,500.00 84.79	12,000.00 84.79
Adjustment Mortgage Bondholder Representatives				
Colonial Trust Company Successor Indenture Trustee	Fee	25,000.00	—0—	—0—
Wagner, Quillinan & Tennant Counsel for Colonial Trust Company	Fee Disb.	65,000.00 148.95	22,500.00 132.11[8]	30,000.00 132.11[8]
Cravath, Swaine & Moore Counsel for former Indenture Trustee	Fee	7,500.00	5,000.00	4,500.00
Brown Committee for Adjustment Income Bondholders	Fee	125,000.00	35,000.00	35,000.00
Eugene Tuck, Secretary to Brown Committee	Fee	5,000.00	1,500.00	1,500.00
Amen, Gans, Weisman & Butler, Counsel for Brown Committee	Fee Disb.	375,000.00 846.34	—0— 618.97[9]	—0— 618.97[9]
Charles B. Wiggin Member of Tinker Committee	Fee	6,500.00	1,000.00	1,000.00
Kresel & Meyerson Co-Counsel for Tinker Committee	Fee Disb.	128,000.00 2,018.89	25,000.00 1,947.17[8]	50,000.00 1,947.17[8]
Baker, Obermeier & Rosner Co-Counsel for Tinker Committee	Fee Disb.	20,000.00 98.85	7,000.00 40.19	7,000.00 40.19
Edward A. Roberts Transit Expert for and Member of Tinker Committee	Fee Disb.	18,750.00 1,293.82	7,000.00 1,262.15[8]	7,000.00 1,262.15[8]
E. Ralph Sterling Financial Expert for Tinker Committee	Fee	11,000.00	3,000.00	3,000.00
Smith Committee for Adjustment Income Bondholders	Fee Disb.	15,000.00 561.22	2,500.00 561.22	2,500.00 561.22
Bergerman & Hourwich Counsel for Smith Committee	Fee Disb.	65,000.00 539.29	20,000.00 477.61[8]	20,000.00 477.61[8]

Applicant		*Amounts Requested*	*SEC's Amounts Recommended*	*Amounts Allowed*
John Bauer Expert for Smith Committee	Fee	16,000.00	5,000.00	5,000.00
Nathaniel Gold Expert for Smith Committee	Fee	8,760.00	2,500.00	2,500.00
Pack & Strumpf Counsel for Leo Brecher, and Adjustment Income Bondholder	Fee Disb.	17,500.00 695.50	7,500.00 695.50	7,000.00 695.50
Charles Poletti; Hoffman, Buchwald, Nadel, Cohen & Hoffman; and Buchman & Buchman, Co-Counsel for various Bondholders	Fee Disb.	90,000.00 479.73	12,500.00 479.73	25,000.00 479.73
Thatcher C. Jones, Chairman of former Bondholders Committee	Fee	750.00	250.00	250.00
Scribner & Miller and Edwin M. Slote, Counsel for former Committee for Adjustment Mortgage Bondholders	Fee Disb.	25,000.00 355.96	4,000.00[10] 355.96	4,000.00[11] 355.96
Tort Claimants Representatives				
William Mertens Counsel for Tort Claimants Committee	Fee Disb.	40,000.00 85.63	10,000.00 85.63	20,000.00 85.63
Alfred S. Julien Counsel for Tort Claim Creditors Committee	Fee	5,000.00	1,500.00	1,500.00
Stockholders Representatives				
Alfred Koerner Counsel for Common Stockholder Group	Fee	40,000.00	7,000.00	7,000.00
Reinhard M. Fischer Expert for Stockholder Group	Fee	375.00	150.00	150.00
Marshall & Stevens, Inc. Expert for Stockholder Group	Fee Disb.	3,680.00 1,128.00	1,500.00 —0—[11]	1,100.00 —0—[11]
A. Philip Woolfson Stockholder	Fee	25,000.00	—0—	—0—

Opinion on Applications for Compensation and Allowances.

Applicant		*Amounts Requested*	*SEC's Amounts Recommended*	*Amounts Allowed*
Miscellaneous				
James Hodes Chief Operating Officer	Fee	17,333.33	—0—	—0—
Allen & Company Underwriter of withdrawn plan	Fee	75,000.00	—0—	—0—
	Disb.	21,551.45	—0—	—0—
Estate of Joseph Nemerov	Fee	11,000.00	—0—	—0—
Louis H. O. Fischman and Emanuel L. Greene	Fee	2,000.00	—0—	—0—
Schwartz & Holtz Claimants for services in Proceeding in New York Supreme Court	Fee	1,500.00	—0—	—0—
Total Fees		$4,304,928.33	$1,787,900.00	$2,036,000.00
Less Interim Allowances		669,780.00	669,780.00	669,780.00
Net Total Fees		$3,635,148.33	$1,118,120.00	$1,366,220.00
Total Disbursements		$ 69,668.45	$ 30,576.45	$ 32,504.73
Less Allowed		13,936.84	13,936.84	13,936.84
Net Total Disbursements		$ 55,731.61	$ 16,639.61	$ 18,567.89
		$4,304,928.33	$1,787,900.00	$2,036,000.00
		69,668.45	30,576.45	32,504.73
Total Fees and Disbursements		$4,374,596.78[12]	$1,818,476.45	$2,068,504.73

Footnotes:

[1] Includes $122,000 allowed and paid on account.

[2] Includes $83,500 allowed and paid on account.

[3] Includes $449,280 allowed and paid on account.

[4] Includes $13,609.74 allowed and paid.

[5] Includes $15,000 allowed and paid on account.

[6] This amount has been allowed and paid.

[7] $500 disbursement to Reis & Chandler to be repaid from the fee allowance granted to Reis & Chandler.

[8] As reduced by applicant.

[9] Represents expenses of Brown Committee advanced by applicant.

[10] $3,000 to be awarded to Scribner & Miller and $1,000 to Slote.

[11] Included in fees recommended and allowed.

[12] Excessive to the extent that Hays, St. John, Abramson & Heilbron included compensation for Edward M. Garlock in the firm's request.

OPINION ON APPLICATIONS FOR COMPENSATION AND ALLOWANCES

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Amendment of Opinion of District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

DIMOCK, D.J.

My opinion on applications for compensation and allowances dated June 30, 1958, is hereby amended as follows:

The portion thereof headed "Plans of Reorganization" is amended so that the last six sentences thereof shall read as follows:

> "The Trustee and counsel succeeded in obtaining a more advantageous proposal from Fifth Avenue. The proposal as thus improved provided for the acquisition by Fifth Avenue of all of the stock of a reorganized company in exchange for $4,881,090 and a sufficient number of shares of the capital stock of Fifth Avenue to provide a distribution of 15 shares of such stock for each $1,000 face amount Adjustment Bond, with a minor participation for general unsecured creditors. Having thus secured an improvement of the offer, the Trustee withdrew his second amended plan and joined in the Income Bondholders Committee plan, as so improved and amended, which was thereafter referred to as the Joint Plan. On June 27, 1956, the court referred the Joint Plan to the Public Service Commission and the Securities and Exchange Commission. It was approved by both Commissions and, on July 24, 1956, the court granted the Trustee's motion for an order approving the Joint Plan. The Joint Plan was accepted by the requisite proportions of security holders on October 8, 1956 and the court signed an order confirming it."

Dated: July 23, 1958.

E. J. DIMOCK,
United States District Judge.

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 263—October Term, 1958.

(Argued April 15, 1959 , Decided May 11, 1959.)

Docket No. 25474

SURFACE TRANSIT, INC., *et al.*,

Appellants,

v.

SAXE, BACON & O'SHEA, *et al.*,

Appellees.

In re Allowances in ESTATE OF THIRD AVENUE TRANSIT CORPORATION,

Debtor.

Before:

CLARK, Chief Judge, and
SWAN and MOORE, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Surface Transit, Inc., and others appeal from orders making final allowances to counsel in the reorganization proceedings of Third Avenue Transit Corporation and its subsidiaries. Orders affirmed, modified, or reversed in accordance with the opinion.

JOHN A. WILSON, of Shearman & Sterling & Wright, New York City (W. M. L. Robinson, of Shearman & Sterling & Wright, New York City, on the brief), for appellants Surface Transit, Inc., Westchester Street Transportation Co., Inc., and Warontas Press, Inc., the Reorganized Companies.

ABE FORTAS, of Arnold, Fortas & Porter, Washington, D. C. (Abe Krash, of Arnold, Fortas & Porter, Washington, D. C., and Hiram S. Gans and Ernest Leff, New York City, on the brief), for appellant Hiram S. Gans.

MORTIMER BRENNER, of Lehman, Goldmark & Rohrlich, New York City (Jerome L. Abrams, of Lehman, Goldmark & Rohrlich, New York City, on the brief), for appellant I. Howard Lehman, Trustee.

JAMES E. FREEHILL, New York City (James J. Geraghty, deceased, and Frederick G. Demarest, New York City, on the brief), for appellant Lester T. Doyle, Trustee.

THOMAS G. MEEKER, Gen. Counsel, and David Ferber, Asst. Gen. Counsel, Securities and Exchange Commission, Washington, D. C. (Richard V. Bandler, Special Counsel, Securities and Exchange Commission, New York City, and Arthur Blasberg, Jr., Peter H. Morrison, and Harvey Frank on the brief), for Securities and Exchange Commission.

OSMOND K. FRAENKEL, of Hays, St. John, Abramson & Heilbron, New York City (Morris Shilensky, of Hays, St. John, Abramson & Heilbron, New York City, on the brief), for appellants Hays, St. John, Abramson & Heilbron.

THOMAS O'GORMAN FITZGIBBON, of Davis Polk Wardwell Sunderland & Kiendl, New York City (Saxe, Bacon & O'Shea and William A. Kaynor, of Davis Polk Wardwell Sunderland & Kiendl, New York City, on the brief), for appellee Saxe, Bacon & O'Shea.

EDWARD M. GARLOCK, New York City, *pro se.*

MORTON E. YOHALEM and HAROLD P. SELIGSON, New York City, for appellees Amott Committee and its counsel Harold P. Seligson, Edmund Burke, Jr., and Morton E. Yohalem.

ARTHUR KARGER, New York City, for appellee Estate of Robert Irving Lennox.

JOHN DWIGHT SULLIVAN, of Murphy, Block, Sullivan & Sawyer, New York City (Daniel W. Blumenthal, Victor S. Geftner, and Mendel Lurie, New York City, on the brief), for appellees the O'Connell Committee and counsel.

HAROLD I. MEYERSON, of Kresel & Meyerson, New York City, for appellees Charles B. Wiggin, Edward A. Roberts, E. Ralph Sterling, and Kresel & Meyerson.

FRANK H. HEISS, of Kelley, Drye, Newhall & Maginnes, New York City (John J. Loflin, Jr., of Kelley, Drye, Newhall & Maginnes, New York City, on the brief), for appellees The Hanover Bank, Indenture Trustee, and Kelley, Drye, Newhall & Maginnes, counsel for The Hanover Bank.

WILLIAM MERTENS, New York City, *pro se* and counsel for appellee Tort Claimants Committee.

DENNIS M. HURLEY and JOSEPH E. SWIERZBINSKI, New York City, for appellee Edward C. Maguire, Special Counsel to Trustees.

CHARLES POLETTI, New York City, Edmund B. Hennefeld, of Hoffman, Buchwald, Nadel, Cohen & Hoffman, and Buchman & Buchman, New York City, for appellees Charles Poletti, Hoffman, Buchwald, Nadel, Cohen & Hoffman, and Buchman & Buchman.

SIDNEY R. NUSSENFELD and WAGNER, QUILLINAN & TENNANT, New York City, for appellee Wagner, Quillinan & Tennant.

OSCAR S. ROSNER and ABRAHAM ALTUS, of Baker, Obermeier & Rosner, New York City, for appellee Baker, Obermeier & Rosner, co-counsel for Tinker Committee.

CLARK, Chief Judge:

This is the final round in the Chapter X reorganization of the Third Avenue Transit Corporation, a common carrier of passengers, and its subsidiaries instituted by the filing of an involuntary petition on October 25, 1948. The debtor at that time was enmeshed in what seemed to be insoluble problems involving limitations on the fares it could charge, heavy wage demands of its employees, and franchise tax demands of New York City. The parties to this appeal are in near unanimity that the reorganization was unusually successful in achieving a workable solution of these problems and in creating reorganized companies of considerable financial strength.[1] Amidst this genuine glow of success it is indeed difficult for any court or agency

---

[1] The affairs of this debtor have been before the court in many aspects. See, e.g., *In re Third Avenue Transit Corp.*, 2 Cir., 192 F. 2d 971; *In re Third Avenue Transit Corp.*, 2 Cir., 198 F. 2d 703; *In re Third Avenue Transit Corp.*, 2 Cir., 222 F. 2d 466; *In re Third Avenue Transit Corp.*, 2 Cir., 230 F. 2d 425; *In re Third Avenue Transit Corp.*, 2 Cir., 233 F. 2d 310; *In re Third Avenue Transit Corp.*, 2 Cir., 238 F. 2d 665, certiorari denied *Woolfson* v. *Doyle*, 352 U. S. 1031; *Johnson Fare Box Co.* v. *Doyle*, 2 Cir., 250 F. 2d 656.

dispassionately to evaluate the several applications for compensation filed below. For nearly all the participants richly merit the heartfelt thanks of the court and the public, as well as those of the particular group or interest their efforts may have more directly benefited.

The granting of allowances, however, involves a more complex amalgamation of considerations which can be only imperfectly sketched out for application in future cases. Economy of administration, the burden the estate can safely bear, the value of the services to it, the duplication of service by many counsel representing the same interest, and the reasonableness and fairness of the compensation to each applicant are all steps along the way to a final determination. *Finn* v. *Childs Co.*, 2 Cir., 181 F. 2d 431; *Newman & Bisco* v. *Realty Associates Securities Corp.*, 2 Cir., 173 F. 2d 609; *In re Porto Rican American Tobacco Co.*, 2 Cir., 117 F. 2d 599; *In re Paramount Publix Corp.*, 2 Cir., 85 F. 2d 588, certiorari denied *Palmer* v. *Paramount Pictures*, 300 U. S. 655. And the recommendations of the Securities and Exchange Commission, representative of the public interest, are entitled to great weight. *Scribner & Miller* v. *Conway*, 2 Cir., 238 F. 2d 905; *Finn* v. *Childs Co.*, *supra*, 2 Cir., 181 F. 2d 431. Ultimately, however, the court's determination must be made on the facts and circumstances of each case.

Some forty-five applications for compensation were filed in the instant proceedings below, requesting over $4,000,000 in fees and disbursements. While on the record before us we cannot say that Judge Dimock's aggregate allowance of $2,028,504.73 is more than the reorganized companies can safely bear, in a variety of respects we are constrained to disagree with specific awards made by the court below. We shall discuss the modifications we are ordering; in the matters not discussed the allowances are affirmed. And we shall limit our discussion to a brief exposition of our substantial reasons, assuming familiarity with the comprehensive opinion of the district court.

In any reorganization the trustee and his counsel normally bear by far the largest burden of any of the participants. This was particularly true here, where fare, wage and tax rates facing the debtor had first to be modified before any readjustment of its financial structure would be of value. But on the other hand the compensation of these participants was always assured, and not contingent on success, as, for example, that of bondholders' representatives largely is; and much of the total time logged by trustee's counsel was in the performance of essentially routine work actually done by firm associates. We affirm the district court's award to trustee Lehman and his successor Doyle, and reduce the award of $900,000 granted trustee's counsel Saxe, Bacon & O'Shea to the amount suggested by the S. E. C., namely, $800,000.

The district court awarded The Hanover Bank, trustee of the Refunding Mortgage, $35,000—a substantial increase over the Commission's recommended award of $20,000. Although it considered the same factors as did the Commission in making its recommendation, the court also expressed the view that the bank's charge to a private client for the extraordinary services it rendered in this reorganization would be in the neighborhood of $70,000. Giving full weight to this holding, we are yet constrained to conclude that the increase granted below was overgenerous. We reduce this award to $30,000.

Because of their great assistance to the court, Judge Dimock also granted awards substantially in excess of the S. E. C.'s recommendations to Kelley, Drye, Newhall & Maginnes, counsel to the indenture trustee, to Edward M. Garlock, and to counsel for the Amott Committee, Messrs. Seligson, Burke, and Yohalem. While neither the Commission nor the reorganized companies on this appeal depreciate the value of these counsel's services, yet in view of the degree of duplication the Commission found in the efforts of the bondholders' representatives we must hold that the court's increases of the Commission's recom-

mended allowances, ranging from 30% in the case of Mr. Garlock to 50% to Mr. Seligson and his associates, were excessive. We award the Kelley firm $117,500, Mr. Garlock $132,500, and Mr. Seligson *et al.* $125,000.

The allowance to Garlock raises another problem brought us by the appeal of Hays, St. John, Abramson & Heilbron. This firm was co-counsel for petitioning creditors, along with Garlock and, for a short time before he died, Mr. Robert Irving Lennox, whose estate also received an award. Prior to filing the petition the Hays firm and Garlock entered into an oral agreement to share equally in such compensation as they received from the reorganization. A falling out shortly occurred between them, however. While Garlock carried a substantial burden throughout the reorganization, the Hays firm, with the exception of a few instances, merely held itself ready to give assistance to Garlock, should he have required it. The trial court found that the oral agreement between them as to compensation clearly contemplated an equal division of work as well as of compensation. As this did not occur we see no error in the award of separate compensation to each. Clearly the court has the power to do so. *Leiman* v. *Guttman*, 336 U. S. 1; *Brown* v. *Gerdes*, 321 U. S. 178; *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262. And the allowance of $10,000 granted to the firm seems fair and reasonable compensation for the services it actually rendered the estate.

The Estate of Robert Irving Lennox was awarded $7,500 for Mr. Lennox's short service as co-counsel to petitioning creditors with Mr. Garlock and the Hays firm. This was the sum recommended by the S. E. C. Undoubtedly the estate is somewhat at a disadvantage in assembling records as to the work done by its decedent. But we cannot allow an award based on speculation to stand; and the present award is excessive compensation for Mr. Lennox's limited proven activity. Hence we are compelled to reduce this allowance to $2,500.

Similarly the Commission's own description of the services performed by Murphy, Block, Sullivan & Sawyer, counsel for the O'Connell Committee—yet another committee of refunding bondholders—suggests to us that the district court ought to have cut, rather than raised by $5,000, the S. E. C.'s proposed award of $45,000. We modify the order below to grant them $40,000.

The court granted Kresel & Meyerson, co-counsel for the Tinker Committee of adjustment mortgage bondholders, an increase of 100% over the S. E. C.'s recommended award of $25,000. Without detracting from the praise Judge Dimock gave these applicants for their assistance, we must note that he did not disturb the S. E. C.'s finding that they contributed only 1,000 hours of useful nonduplicative work. Viewed in this light the court's award seems indeed generous. We feel that $30 an hour is ample consideration for these applicants' contributions, and we reduce their award to $30,000.

The court also doubled the S. E. C.'s recommended allowance to Charles Poletti; Hoffman, Buchwald, Nadel, Cohen & Hoffman; and Buchman & Buchman on what we feel was an inadequate basis. These applicants, co-counsel to various bondholders, obtained for the estate a commitment as to dividends from Fifth Avenue Coach Lines, purchasers of the reorganized companies. This commitment actually brought to the estate one dividend on the stock paid for the companies amounting to $168,000 and assured the estate that other dividends would not be lost through a delay in the consummation of the plan. We do not feel that the S. E. C. unduly minimized the value of this contribution and hence we reduce this award to $12,500—the sum the Commission recommended.

There remain to be considered the appeal of Hiram S. Gans from Judge Dimock's decision, D. C. S. D. N. Y., 159 F. Supp. 440, disqualifying him from all compensation by virtue of §249 of the Bankruptcy Act, 11 U. S. C. §649, and the S. E. C.'s objection to Judge Dimock's refusal to

disqualify the firm of Baker, Obermeier & Rosner under the same statute. Gans, an active participant in this proceeding from its inception in August 1948, was counsel to an adjustment bondholders' committee and was instrumental in bringing in Fifth Avenue Coach Lines as purchasers of the reorganized companies. In October 1951 in response to a margin call by his pledgee he sold for $5,271.14 certain Third Avenue bonds which he had owned at the inception of his participation in the reorganization and had pledged in March 1951 along with other securities as collateral for a loan.

Section 249 bars an allowance to any person who while acting in a fiduciary or representative capacity in the reorganization proceedings "has purchased or sold" stock of or claims against the debtor, "or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." Concededly the power of the court to consent to or approve a transaction extends only to those transactions embraced in the second of the above quoted phrases and does not extend to the first described transfers. *Otis & Co.* v. *Insurance Bldg. Corp.*, 1 Cir., 110 F. 2d 333. It would seem that any disposal of securities of the debtor pursuant to a pledge arrangement instituted after the applicant had assumed a representative or fiduciary capacity in a reorganization must fall within the class of transactions absolutely prohibited. Sale by the pledgee is of course pursuant to a power of sale granted by the owner; and such a pledge may often operate in practical effect as a "stop loss order"—an order to a broker to sell if the market value of the securities drops below a specific price. If one exercising the perquisites and receiving the benefits of ownership can thus easily avoid the statutory bar by the form chosen for the particular transaction, its deterrent effect is largely dissipated.

Alternatively Judge Dimock's finding that Gans could have met his pledgee's margin call without selling any of the

Third Avenue Bonds had he chosen to do so is amply sustained. At that date he was indebted to the pledgee for a total of $21,496 (including $4,296 on a personal note to which this collateral was technically also subject). The value of the other securities pledged as collateral for these loans totaled $17,691.49; it also affirmatively appears in the record that Gans then owned additional Third Avenue Bonds and Mexican Railway bonds of substantial value. Clearly from these resources Gans by further pledge or other sales could have avoided a sale of any of his Third Avenue securities. Under these circumstances the court could not properly approve the transaction, since the decision to sell was clearly Gans' own, not the pledgee's.

This result may well work harshly in individual cases as here. But in §249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations. See 6 Collier on Bankruptcy ¶13.18 (1947). In the past excuses of inadvertence or *de minimis* have not been permitted to undermine the section, and we do not feel we can narrowly constrict it here. *Cf. Otis & Co.* v. *Insurance Bldg. Corp., supra*, 1 Cir., 110 F. 2d 333; *In re Norwalk Tire & Rubber Co.*, D. C. Conn., 96 F. Supp. 274, 276.

We reach a similar conclusion as to the disqualification of the firm of Baker, Obermeier & Rosner. The basis on which the S. E. C. urges this disqualification is a sale of $5,000 face amount of Third Avenue adjustment income bonds by the wife of Oscar S. Rosner, the firm's most active participant in the reorganization. Judge Dimock found on undisputed evidence that Mrs. Rosner's decision to sell was based entirely on the advice of her investment broker, and that no inside information possessed by Mr. Rosner entered into the decision. But it also appears that Mr. Rosner not only was fully aware of the contemplated sale, but himself handled the mechanics of the transaction with the broker. The statute §249 has a very broad sweep applying to stock

of the debtor in which "a beneficial interest, direct or indirect, has been acquired or transferred by [the attorney] or for his account, after the commencement of such proceeding"; and facts equivalent to these present here on several occasions have been held sufficient basis for the statutory disqualification. Indeed we know of no actual holdings to the contrary. See *S. E. C.* v. *Dumaine*, 1 Cir., 218 F. 2d 308, 313-316, certiorari denied *Dumaine* v. *S. E. C.*, 349 U. S. 929; *In re Midland United Co.*, 3 Cir., 159 F. 2d 340; *In re Central States Elec. Corp.*, 4 Cir., 206 F. 2d 70, 71-72, certiorari denied *Henis* v. *Egan*, 346 U. S. 899. The language of *Berner* v. *Equitable Office Bldg. Corp.*, 2 Cir., 175 F. 2d 218, and *Nichols* v. *S. E. C.*, 2 Cir., 21[illegible] F. 2d 412, 416-417, on which the court below relied, is perhaps broader than those decisions warrant. Each case is clearly distinguishable on its facts from the instant situation; and on the reasoning of the above cited decisions we hold that the Rosner firm is disqualified from compensation by the transaction here complained of.

Hence the following awards will be reduced to the sums stated: Saxe, Bacon & O'Shea to $800,000; The Hanover Bank to $30,000; Kelley, Drye, Newhall & Maginnes to $117,500; Edward M. Garlock to $132,500; Harold P. Seligson, Edmund Burke, Jr., and Morton E. Yohalem to $125,000; the Estate of Robert Irving Lennox to $2,500; Murphy, Block, Sullivan & Sawyer to $40,000; Kresel & Meyerson to $30,000; Charles Poletti, Hoffman, Buchwald, Nadel, Cohen & Hoffman, and Buchman & Buchman to $12,500. And affirming the denial of an allowance to Hiram S. Gans, we reverse the award to Baker, Obermeier & Rosner. In other respects the orders are affirmed.

SWAN, Circuit Judge (dissenting in part):

I disagree with my brothers' decision as to disqualification of the firm of Baker, Obermeier & Rosner. It is my understanding, as it was Judge Dimock's, that the rule in

this circuit is that under §249 the fiduciary is not disqualified for compensation by transactions in which he had no beneficial interest, and that he is not conclusively presumed to have a beneficial interest in transactions of his wife. Judge Dimock gave the matter very careful consideration. For the reasons stated in his opinion I think the award to Baker, Obermeier & Rosner should be allowed to stand.

In other respects I concur in the opinion of my brothers.

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FILED
OCT 2 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 285

SAXE, BACON & O'SHEA,
Petitioner,
v.
SURFACE TRANSIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN A. WILSON
W. M. E. ROBINSON
M. VAN VOORHIES
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New York 5, New York

SHEARMAN & STERLING & WRIGHT
Solicitors for Respondents

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Petitioner's statement of the "question presented" includes an unfounded assumption which permeates its entire argument and renders it devoid of merit.	

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POINT SECOND 11

Petitioner has advanced no sound reasons for granting the writ.

POINT THIRD 13

The petition for a writ of certiorari should be denied.

CASES CITED

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 285

SAXE, BACON & O'SHEA,
Petitioner,

v.

SURFACE TRANSIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Saxe, Bacon & O'Shea, attorneys for the reorganization trustees, in the Chapter X reorganization of the Third Avenue Transit System requests this Court to review the evidence and to reconsider the facts and circumstances which constrained the Court of Appeals, Second Circuit, to find as a fact that the reasonable

References: "Pet." — Petition of Saxe, Bacon & O'Shea.
"P.A." — Appendix to Petition of Saxe, Bacon & O'Shea.
"A." — Appendix to Brief in the Court of Appeals of Appellants, Surface Transit, Inc., et al., the Reorganized Companies, filed in this Court by Baker, Obermeier & Rosner in No. 284, Oct. Term 1959.

value of Petitioner's services was $800,000 instead of the $900,000 awarded by the District Court.

The award to Petitioner made by the Court of Appeals coincides with the recommendation made to the District Court by the Securities and Exchange Commission, in its advisory capacity as a party to the proceeding pursuant to Section 208 of the Bankruptcy Act (11 U. S. C. Sec. 608; 52 Stat. 894).

The Facts

Total Costs of Reorganization—$2,566,000

Judge Dimock's order of July 22, 1958, in the District Court, granted allowances for fees and disbursements aggregating $2,068,000 (P.A. 65). But prior reorganization costs for accounting, engineering, appraisals and similar expenses, had aggregated about $500,000—making the grand total of reorganization expenses $2,566,000. With respect to the $500,000, Judge Dimock aptly stated:

> "No sensible person could shut his eyes to the fact that these payments are part of the cost of the reorganization . . ." (P.A. 22)

In all, 45 committees, individuals and attorneys applied for compensation (P.A. 62-65).

Trustee's Estimate of Costs, $1,833,000; the SEC's Recommendations $1,818,000

In May, 1956, the reorganization trustee estimated that the balance of reorganization expenses payable on consummation would be $1,150,000 (P.A. 21). There had been paid, prior to that time, as interim allowances, $683,000 (P.A. 62-65; A. 5-6). Therefore, the trustee's

estimate of total reorganization fees and disbursements aggregated $1,833,000.

At the lengthy allowance hearings, beginning June, 1957, SEC counsel closely examined the applicants. The upshot was that the SEC recommended to the District Court allowances totalling $1,818,000 for fees and disbursements—$15,000 less than the reorganization trustee's estimate of $1,833,000 (P.A. 20; 62-65). Thus, the $2,068,000 allowed by the District Court exceeds:

By $468,000 the amount of $1,600,000 which the reorganized companies estimated was the highest amount which they could and should pay (A. 190-191, 320);

By $235,000 the amount estimated by the reorganization trustee—$1,833,000; and

By $250,000 the amount of $1,818,000 recommended by the SEC.

The District Court Increased by $250,000 the Generous Recommendations of the SEC

The District Court greatly varied the SEC's recommendations. Its awards differ from those recommended by the SEC in 19 out of 37 instances. In 10 of those instances the District Court increased the recommendations of the SEC very substantially—by $295,000—as follows:

Co-Counsel for various bondholders—from $12,500 to $25,000 (P.A. 50);

Indenture Trustee of Refunding Mortgage—from $20,000 to $35,000 (P.A. 30);

Co-Counsel for the Tinker Committee—from $25,000 to $50,000 (P.A. 49);

Counsel for O'Connell Committee—from $45,000 to $50,000 (P.A. 45);

Co-Counsel for petitioning creditors—from $115,000 to $150,000 (P.A. 33);

Counsel for Tort Claimants' Committee—from $10,000 to $20,000 (P.A. 54);

Counsel for The Hanover Bank from $100,000 to $135,000 (P.A. 32);

Counsel for the Amott Committee—from $100,000 to $150,000 (P.A. 43);

Counsel for Colonial Trust Company—from $22,500 to $30,000 (P.A. 47); and

Counsel for the reorganization trustee—from $800,000 to $900,000 (P.A. 28).

Unquestionably, the SEC's recommendation of an overall allowance of $1,818,000 was painstakingly based upon applicable principles authoritatively enunciated again and again by our Courts. Judge Dimock paid generous tribute to "the careful and helpful analysis that the Commission made of the claims" for allowances; and expressly recognized "the active and intimate participation of the Commission and its counsel in the reorganization proceedings" (P.A. 61).

Inevitably—the Large Array of Claimants Expended Much Unproductive and Duplicative Effort

The great array of representatives—45 committees, individuals and attorneys, inescapably, resulted in a duplication of work and effort in many directions. The situation would seem almost to speak for itself. Thus, for example, petitions for allowances were presented by:

19 claimants representing Adjustment Bondholders;

12 claimants alleging participation in persuading the Fifth Avenue Coach Line to enter the reorganization proceedings;

11 claimants for services in effecting distributions to Refunding Bondholders; and

14 claimants alleging participation in litigation over bonds held by the debtor company in its treasury (P.A. 63-64; and petitions for allowances).

The District Court's Allowance Represented an Inordinately Large Percentage of the Value of the Debtor's Estate

The District Court found that the value of the debtor's estate on December 17, 1956, the date of consummation of reorganization, was $28,375,000. This value it found largely on the basis of the market value of the outstanding bonds of the debtor company (P.A. 21).

To the total market value of those bonds, that is, $27,225,000, the Court added a highly speculative factor —the reorganization trustee's estimate of the balance of fees and allowances—another $1,150,000. Moreover, the Court *presumed* that the trustee's estimate of $1,150,000 had been discounted in the market price of the bonds. Adding that highly speculative figure to the total market value of the bonds, the Court arrived at a total securities valuation of $28,375,000, which it then assumed to be the approximate value of the debtor companies (P.A. 21).

Thus, the grand total of reorganization expenses, $2,566,000 is 9% of the District Court's valuation of the debtor company, an inordinately large percentage of what the SEC characterized as "an unduly high" valuation. Unlike Judge Dimock, the SEC had based its valuation of the debtor companies primarily upon capitalization of earnings, and had arrived at a consider-

ably more modest value—between $20,000,000 and $25,000,000—but closer to $25,000,000 (A. 189-190).

The Allowance of $2,068,000 Was More Than 30% of the Entire Operating Income During the Reorganization Period

From June 21, 1949 to December 17, 1956, the date of consummation, the entire operating income amounted to only $6,677,000. The allowance of $2,068,000 was, therefore, more than 30% of the operating income over the period of 7½ years of reorganization. The operations of the reorganization trustee resulted, in fact, in a *net deficit* of $13,611,000 during that period (A. 381; A. 379; A. 383; A. 367).

The District Court Attached Undue Weight to Peak Financial Factors, Such As the Operating Income of $2,400,000 in the Peak Year, 1956

Referring to the hazardous nature of bus operations in the metropolitan area, the District Court made a most meaningful comment when it said:

> "The one thing on which all parties agreed was that the characteristic of the curve of future earnings of the system would be an unending series of peaks and valleys." (P.A. 24)

Nevertheless, in characterizing the reorganization as a highly successful one, the Court emphasized an exceptional operational peak. Thus, the Court pointed out that the last full year of operation during reorganization, the year 1956, showed operating income of $2,400,000 (P.A. 5). But the Court did not note that this was the second highest peak of earnings during a period of about 15 years, back as far as 1943.

During the 6½ years prior to 1956, with its peak operating income of $2,400,000, average annual operating income was only $671,000. Over the 13-year period prior to 1956, that is, from 1943 to 1955 inclusive, the average annual operating income was only $598,000. Thus, the total cost of reorganization, $2,566,000 was about four times this average annual income (A. 377; A. 380; A. 381; A. 379; A. 383).

Further, the operating income of $2,400,000 for 1956 dropped to an operating income of $1,683,000 in 1957, a decline of over $700,000. The District Court, indeed, made a very temperate statement, when it pointed out that:

> ". . . at the moment of writing [June 30, 1958], the transportation business in New York City is not as profitable as at the close of the reorganization." (P.A. 24)

For, the operating income had, in fact, fallen off further in the first six months of 1958 to an *operating loss* of $650,000, a decline of $2,333,000 from the peak of 1956. The net loss of the reorganized companies for the entire year 1958 was $876,167.*

Primarily, the peak earnings of 1956, so strongly emphasized by the District Court, were due to the grant by the Board of Estimate of the City of New York of a fare increase from 13¢ to 15¢, effective January 1, 1956 (P.A. 10-12). But, unfortunately, the beneficent

* The 1958 Annual Report of Fifth Avenue Coach Lines, Inc. (p. 18) contains the financial statements of the reorganized companies. It was first submitted to the Court of Appeals, upon the argument, by Counsel for Petitioners and subsequently by Counsel for Respondents here. A certified copy of that report has been filed by Respondents as an additional part of the record in this proceeding No. 285, Oct. Term 1959, to supplement the appendix record filed by Baker, Obermeier & Rosner in No. 284.

effect of this fare increase wore off all too soon, due to increased costs, principally greatly increased wages to labor.

The $5,000,000 in Cash and Securities as of December 31, 1956 Was Also an Undependable Peak Index of Ability to Pay

To be sure the debtor companies had about $5,000,000 of working capital at the end of 1956, but that did not mean this sum was available for current operating expenses or for payment of reorganization allowances. For large amounts of cash have been and still are needed for rehabilitation of company properties, which have been in seriously rundown condition.

Already, the reorganized companies have spent large sums for such rehabilitation, and in the interests of the travelling public much more cash must be spent for these essential operational purposes. Of special significance is the fact, that these companies, operating a bus transit system, are strongly affected with a vital public interest (A. 97, 276-289).

Any financial generalization which tends to overemphasize financial peaks in this public utility industry, harassed by taxes and labor problems as it is, is bound to be unrealistic and unsound. For this bus transit business is indeed a business of unusual financial hazards in which the financial valleys and not the financial peaks predominate.

The evidence convincingly establishes that the total cost of reorganization, $2,566,000, including the overall allowances of $2,068,000 was so excessive and unreasonable as to jeopardize the future financial soundness of the reorganized public utility companies.

Upon all of the facts and circumstances, the Court of Appeals made reductions in specific allowances, which totalled $219,500, and reduced the District Court's aggregate allowance from $2,068,000 to $1,848,500, or $30,500 in excess of the aggregate allowance recommended by the SEC.

POINT FIRST

Petitioner's statement of the "question presented" includes an unfounded assumption which permeates its entire argument and renders it devoid of merit.

Petitioner has prefixed to its statement of the "Question Presented" the unfounded assumption: "Where the Bankruptcy Court has not abused its discretion in fixing fees under Chapter X of the Bankruptcy Act . . ." (Pet. 2). This assumption is based upon the erroneous notion that the Court of Appeals, before it can properly modify any award of the District Court, must first find, *in haec verba*, that the District Court has "abused its discretion." Such contention is a mere play upon words.

The opinion of the Court of Appeals contains many clear indications of the standards which that Court applied in its review and modification of the allowances awarded by the District Court. Unmistakably, the opinion shows that the Court of Appeals found that certain of the awards were so unreasonable and excessive as to "constrain" modification. Certainly, that which is excessive or over-generous is unreasonable, and an award of that which is unreasonable results in "an abuse of discretion", compelling correction.

Thus, the Court of Appeals pointed out: that amidst the "genuine glow of success it is indeed difficult for

any court or agency dispassionately to evaluate the several applications for compensation filed below" (P.A. 73-74); that "in a variety of respects we *are constrained* to disagree with specific awards made by the Court below" (P.A. 74); that the award to The Hanover Bank, for example, was "over generous" (P.A. 75); that the awards to counsel for Hanover Bank, to counsel for petitioning creditors, to counsel for the Arnott Committee and to the co-counsel for petitioning creditors were "excessive" (P.A. 75-76); that "the Court was compelled to reduce" the allowance to the Estate of Robert Irving Lenox to $2,500 because the award was "based on speculation" (P.A. 76); that the award to co-counsel for the Tinker Committee seemed "indeed generous" and the award allowed by the Court of Appeals was "ample consideration" for the contributions of these applicants (P.A. 77); and that the award to Charles Poletti et al., was "also doubled" by the District Court on what the Court of Appeals felt was "an inadequate basis" (P.A. 77).

Certainly, abuse of discretion does not merely mean decision by whim or caprice, or arbitrarily or from bad motive. It means, also, and more usually, that the discretion has not been justly and properly exercised, and has resulted in an erroneous conclusion against the logic and effect of the facts and circumstances presented. Such "abuse of discretion" the Court of Appeals here found when it stated it was "constrained to disagree with specific awards made by the Court below", and then proceeded to reduce those awards, including the award of $900,000, to the petitioner here.

POINT SECOND

Petitioner has advanced no sound reasons for granting the writ.

I

At page 5, Point I, Petitioner asserts that the decision of the Court of Appeals "conflicts with the well-settled rule exemplified in the decisions of seven other Courts of Appeals", citing, but without any discussion, cases from seven other Circuits. But none of the cited cases, in fact, conflicts with the decision of the Court of Appeals here. The concept of what constitutes an "abuse of discretion" we find the same in all the Circuits, including the Second.

Petitioner also points out (Pet. 5) that the Courts of other Circuits have respected the findings of the District Judge except "where abuse of discretion" has been found. This also is the rule, however, in the Second Circuit. Thus in the leading case of *Finn* v. *Childs Co.*, 181 F. 2d 431 (2 Cir. 1950) Judge Clark who wrote the opinion in the present case, stated at page 435:

> "... recognizing, too, the peculiar advantage which the district judge has by virtue of his intimate knowledge of the whole history of the reorganization, appellate judges can come to the conclusion that the lower court has *exceeded its discretion* in granting allowances only with the greatest reluctance." (Emphasis added)

Petitioner further points out (Pet. 5-6) that in other Circuits "abuse" is defined as "manifesting a disregard of right and reason," and equates this with the "clearly erroneous" test of Rule 52(a) F. R. C. P.

Patently, that is also the rule in the Second Circuit and was clearly the one which was applied in the present case. All that is lacking, in the opinion of the Court in this case, are the *specific* words which petitioner seeks now to invest with magic value, "abuse of discretion." These were omitted as a matter of judicial courtesy, no doubt, rather than in disregard of settled judicial principle.

II

At pages 6-7, Point II, Petitioner also contends that the decision below conflicts with the principle expressed in decisions of this Court.—But the decisions cited are obviously not in point and Petitioner does not show any respect in which they are claimed to be in conflict.

III

At pages 7-8, Point III, Petitioner contends that the "Question Presented" is of general importance and urges that the award to Petitioner of "modest compensation" in the amount of $800,000 instead of $900,000 may lead to reluctance on the part of other counsel to undertake representation in bankruptcy proceedings. And the implication of Petitioner is clear that this alleged paring by the Court of Appeals was done "capriciously".

Petitioner seems to concede (p. 9), at least, that the fee allowance question here presented may seem "at first blush too factual in nature to require the exercise of this Court's certiorari jurisdiction." We submit, however, that even sustained consideration of this ques-

tion leads to the same conclusion. Obviously, the decision of the Court of Appeals here is dependent on the facts and circumstances of this particular case and is of importance only to the parties directly involved. Thus the Court of Appeals said, in its opinion:

> "Ultimately, however, the Court's determination must be made on the facts and circumstances of each case." (P.A. 74)

POINT THIRD

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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W. M. L. ROBINSON
M. VAN VOORHIES
Counsel for Respondents.

Dated: New York, N. Y.
October 1, 1959

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525604—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 285

SAXE, BACON & O'SHEA, PETITIONER

v.

SURFACE TRANSIT INC., ET AL.

No. 384

EDWARD M. GARLOCK, PETITIONER

v.

SURFACE TRANSIT INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT[1]

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Saxe App. 70–81)[2] is reported at 266 F. 2d 862. The opinion of

[1] These petitions are two of five directed to the judgment entered by the Court of Appeals for the Second Circuit on May 11, 1959, with respect to fee allowances in the reorganization under Chapter X of the Bankruptcy Act of Third Avenue Transit Corporation and subsidiary debtors. The other petitions, Nos. 284, 374, and 382 are the subject of two separate briefs of the Securities and Exchange Commission in opposition. The Commission was a party to the reorganization proceedings pursuant to Section 208 of the Bankruptcy Act (11 U.S.C. 608).

[2] "Saxe App. —" refers to the separately bound appendix filed in this Court by petitioner in No. 285.

the District Court dealing with the issues raised by the petitions in No. 285 (Saxe App. 28–29) and No. 384 (Saxe App. 33–42) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1959. A timely petition for rehearing was filed, affecting petitioner in No. 384; it was denied on June 8, 1959. The petition for a writ of certiorari in No. 285 was filed on August 7, 1959, and the petition in No. 384 was filed on September 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals has the power to modify awards in a Chapter X reorganization proceeding where the District Court inadequately considered important criteria.

STATUTE INVOLVED

The pertinent provisions of the Bankruptcy Act (52 Stat. 840, 11 U.S.C. 1, *et seq.*) are set forth at Saxe App. 1.

STATEMENT

These petitions arise out of proceedings under Chapter X of the Bankruptcy Act (11 U.S.C. 501, *et seq.*) for the corporate reorganization of Third Avenue Transit Corporation and subsidiary debtors.

After consummation of a plan of reorganization, hearings were fixed to consider applications for final allowances. Some 45 applications were filed requesting compensation of over $4,000,000. Petitioner in No. 285, Saxe, Bacon & O'Shea, requested $1,074,280,

and petitioner in No. 384, Edward M. Garlock, requested $300,000 (Saxe App. 29, 35). The Securities and Exchange Commission made recommendations for fees aggregating $1,787,900 and for these petitioners, respectively, it recommended $800,000 and $115,000. The Commission's recommendations represented for each applicant entitled to compensation what it believed was fair and reasonable compensation judged by the criteria in bankruptcy reorganization proceedings enunciated by this Court and lower courts (see, *e.g.*, *Callaghan* v. *Reconstruction Finance Corporation*, 297 U.S. 464; *Finn* v. *Childs Co.*, 181 F. 2d 431 (C.A. 2)). Its recommendations assumed that compensation in such a proceeding is not comparable to amounts chargeable to solvent clients, yet must be sufficient to encourage adequate representation in future reorganizations. The Commission considered that the aggregate of the fees so reached was reasonable, in relation to the length and difficulty of the proceeding and the size of the estate, and was within the ability of the reorganized companies to pay.

The District Court determined that the estate could afford and should pay $250,000 more than the aggregate fees recommended by the Commission, and proceeded to allocate this greater amount among the applicants in accordance with its determination as to their relative contributions. Petitioner Saxe, Bacon & O'Shea was awarded an allowance of $900,000 and petitioner Edward M. Garlock $150,000 (Saxe App. 22, 29, 39).

The Court of Appeals agreed that there was no issue as to the ability of the reorganized companies to pay the aggregate of the awards made by the Dis-

trict Court. It held, however, that certain of the awards were excessive, and it proceeded to direct specific modifications. As to petitioner Saxe, Bacon & O'Shea, the Court of Appeals found that that firm's compensation as trustees' counsel was always assured and not contingent and that much of the time spent was in performance of routine duties and done by firm associates; it reduced the firm's award to $800,000, the amount recommended by the Commission. As for petitioner Edward M. Garlock, the Court of Appeals determined, in the light of the degree of duplication found by the Commission to have occurred in the efforts of the refunding bondholder representatives, including that petitioner, that the District Court's award was excessive and reduced it to $132,500.

ARGUMENT

These petitions present merely the question of the quantum of compensation awarded to particular applicants. No significant question of administration of Chapter X of the Bankruptcy Act is raised which merits review by this Court.

Petitioners urge that the modifications by the Court of Appeals of the final allowance awards made by the District Court were arbitrary and capricious since the opinion of the Court of Appeals did not specifically state that the District Court had abused its discretion or was clearly erroneous.[3] An examination of the opinion of the Court of Appeals, however, will demon-

[3] The Court of Appeals more gently stated that: "* * * in a variety of respects we are constrained to disagree with specific awards made by the court below" (Saxe App. 74).

strate that where it made modifications it characterized the awards of the District Court as "excessive" (Saxe App. 76), "generous" (Saxe App. 77) and "overgenerous" (Saxe App. 75), and specifically with respect to these petitioners it found that the District Court had ignored or inadequately evaluated pertinent factors affecting their compensation.

In considering the District Court's award of $900,000 to petitioner Saxe, Bacon & O'Shea, the Court of Appeals noted that "the compensation of these participants was always assured, and not contingent on success, as, for example, that of bondholders' representatives largely is; and much of the total time logged by trustee's counsel was in the performance of essentially routine work actually done by firm associates" (Saxe App. 75). In emphasizing these considerations, the Court of Appeals was patently finding that the District Court had inadequately weighed these factors in fixing the award, and had therefore erred. The Court of Appeals corrected the error by reducing the award to $800,000.

So too, in the District Court's award to petitioner Edward M. Garlock, the Court of Appeals found error. Garlock was one of several representatives of refunding mortgage bondholders. The Commission had pointed out to the District Court that, while these representatives had succeeded to some extent in eliminating duplicative activity, there still remained significant overlapping of services. The District Court, while noting that duplicative services could not be compensated, failed however to apply the principle in practice. Thus, with this petitioner as well as

other refunding mortgage representatives, the District Court relied in part in its awards upon the total time allegedly spent by each; but elimination of duplicative effort clearly requires that the time of each of the affected applicants be deemed reduced—which the court did not do. In modifying the District Court's award to petitioner Garlock, the Court of Appeals stated (Saxe App. 75–76):

> in view of the degree of duplication the Commission found in the efforts of the bondholder's representatives we must hold that the court's increases of the Commission's recommended allowances, ranging from 30% in the case of Mr. Garlock to 50% to Mr. Seligson and his associates, were excessive.

Again, the Court of Appeals found, with ample basis, that the District Court had inadequately considered an important criterion affecting compensation.

What remains is the contention that the Court of Appeals failed in the course of its opinion to use the words "abuse" or "error." This would ascribe to these words a magical quality unknown to the law. As we have seen, the substance of the decision of the Court of Appeals is that the District Court plainly erred in its awards to these petitioners.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 285

SAXE, BACON & O'SHEA,

Petitioner,

v.

SURFACE TRANSIT INC., *et al.*,

Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 9, 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 285

SAXE, BACON & O'SHEA,

Petitioner,

v.

SURFACE TRANSIT INC., *et al.*,

Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent's acceptance in its opposing brief of the rule of law upon which our petition was based—viz., that the Court of Appeals cannot substitute its judgment for that of the District Court but is restricted in its intervention to abuses of discretion below—is the occasion for this reply brief, since it permits a summary disposition of the case in this Court.

Respondent contends that the court below observed this principle and found that an abuse of discretion had been committed, and infers that finding from the court's use of such words as "constrained to disagree",

"generous", "indeed generous", "excessive", and the like. Yet in fact, with respect to Petitioner the Court of Appeals simply stated a naked difference of opinion. By no stretch of language did the court say, imply or in any manner suggest that the bankruptcy court had departed from its proper range of discretion in granting to Petitioner an award somewhat higher than the amount which the Court of Appeals would have awarded if sitting in the first instance. No errors of law were cited and indeed the only factors noted by the Court of Appeals as influencing its own valuation of Petitioner's services were factors fully considered by the bankruptcy court (Pet. 3-5).

The language of the Court of Appeals' opinion is similar to that of the Seventh Circuit in *Matter of Chicago & West Towns Railways, Inc.*, 230 F. 2d 364, 368 (1956) (Pet. 5). There the appellate court stated that in view of the "duplication of effort" it considered the allowance of $12,000 "high", particularly in light of the S. E. C. recommendation of $7,000. Nevertheless, but for a conflict of interest question, the court would have affirmed the $12,000 allowance in view of the "wide area of discretion" in the District Judge. Similarly, in *In re Mt. Forest Fur Farms of America*, 157 F. 2d 640, 652-53 (6th Cir. 1946), where the S. E. C. recommended a fee of $45,000 but the District Court allowed $65,000, the Sixth Circuit adverted to the weak cash position of the debtor and the uneconomical administration of the estate, conceded that the $65,000 was more than it would have allowed, but nevertheless concluded that the award fell within the range of discretion of the bankruptcy court.

We do not (as Respondent and others would have it) predicate this application upon the supposed magical

quality of any verbal formula, such as the words "abuse of discretion"; the same result and rule can be attained with any appropriate language; but we do insist that substance is important in bankruptcy administration. It cannot rationally be claimed that the bankruptcy court departed from its range of discretion where the appellate court, in reducing Petitioner's hourly rate of compensation from $21.43 to $19.05; in the same opinion allowed compensation to counsel for certain bondholders at the rate of $30 per hour (App. 77) and acknowledged that the reorganized companies could safely bear the *total* allowances granted by the bankruptcy court (App. 74).

No other case has been found where a difference of opinion amounting to so small a percentage has been considered an abuse of discretion. Where other courts have predicated the reduction of fee allowances on this principle, the reductions have been explained and have been of sufficient magnitude to reflect an abuse. In *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, 104-106, this Court employed *in haec verba* the "abuse of discretion" principle in reducing one allowance by 50% and seven others by 66%, finding that the awards were "much too large" in comparison with various enumerated standards. In *London* v. *Snyder*, 163 F. 2d 621, 626 (8th Cir. 1947), the appellate court reduced the allowance by 50% on the ground that it "so far exceeds the maximum permissible as to constitute an abuse of the court's discretion."

While the words "abuse of discretion" have no particular magic, they do have meaning:

> "Abuse of discretion is a term that has been defined as 'more than an error of law or of judgment; it implies an unreasonable, arbitrary or

unconscionable attitude on the part of the court in granting such motion'." *Hurt* v. *Charles J. Rogers Transportation Co.*, 123 N. E. 2d 39, 41 (Ohio App. 1954).

* * * * * *

"An abuse of discretion is not merely an error of judgment, but only [exists] if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Small* v. *Small*, 185 Pa. Super. 468, 137 A. 2d 870, 872 (1958).

Conclusion

Respondent's concession with respect to our basic point of law renders superfluous an argument upon the merits following the granting of the writ. The opinions below demonstrate upon inspection that the Court of Appeals superseded the District Court without finding abuse of discretion. Hence this Court may appropriately grant the writ and peremptorily reverse the erroneous judgment of the Court of Appeals.

Respectfully submitted,

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